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SUPREME COURT, U.S.

No. 81 6908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELWOOD BARCLAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Elwood Barclay, in proper person
437 East Monroe Street
Jacksonville, Florida 32202

Please serve:

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ELWOOD BARCLAY,

Petitioner,

v.

STATE OF FLORIDA

Respondent.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The original opinion of the Florida Supreme Court is reported as **Barclay v. State**, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). The opinion remanding the case to the trial court for a Gardner hearing is reported as **Barclay v. State**, 362 So.2d 657 (Fla. 1978). The opinion issued by the Florida Supreme Court after resentencing, is not yet reported. See **Barclay v. State**, _____ So.2d _____(Fla. 1982). (Appendix); the order denying a petition for rehearing is not yet reported. See **Barclay v. State**, _____ So.2d _____ (Fla. 1982). (Appendix).

JURISDICTION

The judgment of the Florida Supreme Court was entered June 4, 1981. See **Barclay v. State**, _____ So.2d _____ (Fla. 1982). (Appendix). A timely petition for rehearing was filed, and the Florida Supreme Court entered a judgment April 14, 1982. See **Barclay v. State**, _____ So.2d _____ (Fla. 1982). (Appendix). This petition for certiorari has been filed within the allowable sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. & 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Cons. amend VII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Cons., amend XIV povides:

> Section 1. . . . nor shall any state deprive any person of life, liberty or property without due process of law; . . .

Fla. Stat. Ann Section 921.141.

STATEMENT OF THE CASE

Petitioner, Elwood Barclay, was tried in the Circuit Court of Duval County, Florida, for the murder of Steven Orlando and, on March 3, 1975, the jury returned a verdict of guilty of first degree murder. During the sentencing phase, no additional evidence was presented to the jury as to Barclay; the jury recommended that Barclay be sentenced to life.

The trial court received a pre-sentence investigation to aid him in his sentencing determination. On April 10, 1975, the trial court rejected the jury's recommendation of life and imposed a sentence of death. Barclay appealed to the Florida Supreme Court; however, Barclay's counsel on that appeal did not brief nor argue the propriety of the death sentence; whether the recommendation of life should have been followed; whether the trial court's findings as to certain statutory aggravating circumstances was correct.

On March 17, 1977, the Supreme Court of Florida entered its opinion affirming the conviction and death sentence of petitioner. **Barclay v. State**, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 893 (1978). The petition for certiorari did not raise the issues of the invalidity of aggravating circumstances found by the trial court or any other issues contained in this petition.

On September 7, 1978, the Florida Supreme Court vacated the death sentence of petitioner and ordered the trial court to hold a hearing as provided in **Gardner v. Florida**, 430 U.S. 439 (1977).

After hearings in the trial court, the trial judge issued a written sentence which contained the court's findings as to statutory aggravating and mitigatng circumstances. The trial court found that the aggravating circumstances outweighed the mitigating circumstances; the trial judge rejected the life recommendation and sentenced the petitioner to death.

Barclay appealed to the Florida Supreme Court, and on June 4, 1981, that court issued its judgment affirming the death penalty, on the basis that nothing had been presented to relent the information contained in a presentence investigation; the Court adhered to its first opinion. Barclay v. State, _____ So.2d _____ (1981). (Appendix).

A timely petition for rehearing was filed, and, on April 14, 1982, the Florida Supreme Court entered its judgmnt denying a rehearing by a three to three vote. Barclay v. State, _____ So.2d _____ (Fla. 1982). (Appendix _____).

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW

Petitioner took a direct appeal from the trial court challenging the errneous and arbitrary findings of three aggravating circumstances and one nonstatutory aggravating circumstance. After the affirmance, petitioner filed a petition for rehearing raising the following issues:

WHERE A DEATH PENALTY IS IMPOSED ON A PLURALITY OF AGGRAVATING CIRCUMSTANCES, OF WHICH THREE IS INVALID AND ON A NONSTATUTORY AGGRAVATING CIRCUMSTANCE, THE DEATH PENALTY SHOULD BE SET ASIDE.

The Florida Supreme Court denied the petition for a rehearing by a three to three vote.

THE FLORIDA DEATH PENALTY SENTENCING - PROCEDURE WAS APPLIED TO PETITIONER IN AN ARBITRARY AND CAPRICIOUS MANNER WHICH VIOLATED PETITIONERS FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court examined the Flordia death penalty sentencing procedures - Fla. Stat. Ann. Sec. 921.141 (Supp 1976-1977) - and found the statute to meet the constitutional requirements that Florida death penalties will not be imposed in an arbitrary or capricious manner. This Court placed great reliance on Florida's procedure of appellate review by the Florida Supreme Court to minimize the risk of arbitrary and capricious death sentencings. Although this Court found the death penalty sentencing procedure constitutionally valid, that procedure has been applied in an arbitrary and capricious manner in this case in violation of Petitioner's Fourteenth Amendment Due Process Rights.

Section 921.141, Florida Statute Ann. (1976-1977 Supp.) sets forth eight statutory aggravating circumstances.

(a) The capital felony was committed by a convict under sentence of imprisonment.

Aggravating circumstances in Florida must be proved beyond a reasonable doubt. State v. Dixon, 283 So.2d 1 (Fla. 1973); cert. denied, 416 U.S. 943 (1974). Again, in the two appellant opinions, the Florida Supreme Court did not find that this was not a properly found aggravating circumstance.

The trial court found the existence of another erroneous aggravating circumstance - the defendant was previously convicted of another capital felony or a felony involving the use of threat or violence to the person. Section 921.141(3)(b). The trial court determined:

> The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felony of breaking and entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into. (Appendix).

There was no proof introduced before the trial court as to the breaking and entering conviction; this information appeared on the pre-sentence investigation.

In **Williams v. State**, 386 So.2d 538, (1980), the trial court found that the defendant has previously been convicted of armed robbery and that this established the aggravating circumstance under section 941.121(3)(b). This information, as the conviction information in this case, was gleaned from a pre-sentence investigation.

In **Williams v. State, supra**, the Florida Supreme Court held that the finding as to the section 941.121(3)(b) aggravating circumstance was defective because the state offered no evidence of the conviction in the trial or sentencing phase to prove the prior convictions. The Court held that the State must prove every aggravating circumstance beyond a reasonable doubt and that the trial judge should not have considered this circumstance in his sentence based solely on information contained in the pre-sentence investgation.

In this case, the Florida Supreme Court, in its two opinions, neither discussed nor found this aggravating circumstance to be defective.

The trial court further found that the defendant created a great risk of death to many persons and that the aggravating circumstance under section 921.141(3) existed. (Appendix). The trial court concluded that Barclay and the other defendants drove around Jacksonville looking for a victim or victims and, therefore, exposed every citizen to a great risk of death - on the trial court's theory that every person was a potential

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) At the time the capital felony was committed the defendant also committed another capital felony.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary or kidnapping.

(f) The capital felony was committed for the purpose of avoiding or preventin a lawful arrest or effecting an escape from custody.

(g) The capital felony was committed for pecuniary gain.

(h) The capital felony was especially heinous, atrocious, or cruel, manifesting exceptional depravity.

Section 921.141 and Florida case law provide that the trial judge may consider only statutory aggravating circumstances; this was not done in this case. Section 921.141(4Xa) provides that the fact that the defendant has no significant history of prior criminal activity is a mitigating circumstance.

In its sentencing order, the trial court found that petitioner had an extensive criminal record and concluded that that fact created an aggravating circumstance rather thathan a mitigating circumstance (Appendix). This consideration by the trial court was completely erroneous, for the Florida Supreme, in **Mikenas** v. **State**, 367 So.2d 606 (Fla. 1979), cert. denied, U.S. (19) expressly held that the only aggravating circumstance that a trial court may consider is deciding to impose the death penalty are those contained in section 921.141(3). Although this finding is blatantly invalid, in neither appellant decision did the Florida Supreme Court consider that a nonstatutory aggravating circumstance had been placed in the weighing process by the trial court. **Barclay** v. **State**, supra; **Barclay** v. **State**, after the Gardener remand. (Appendix).

The trial court found that a statutory aggravating circumstance existed under section 921.141(3)(a) - the capital felony was committed by a convict under sentence of imprisonment. The trial court acknowledged that petitioner was not under sentence of imprisonment at the time of the commission of the murder; however, the Court found that the criminal record of petitioner was an aggravating circumstance. (Appendix).

victim. The trial court further found that tapes which were sent to the television stations were an open call for racial war and revolution; therefore, if the call for revolution had been successful, countless numbers would have died - it "boggles the mind".

The evidence in this case shows that one person - Steven Orlando - was killed. If the trial judge's reasoning is followed, every time a robber goes out to rob a convenience store or gas station, the robber is creating a great risk of death to many persons simply because every convenience store employee or every gas station employee in the area could be the potential victim. The construction placed upon this aggravating circumstance was not intended by the legislature and has not been given that construction in other cases by the Florida Supreme Court.

In Kampff v. State, 371 So.2d 1007 (Fla. 1979), this court reversed a death sentence to life where there was a recommendation of death by the jury. The trial court found that the fact five shots were fired at the victim while two other employees were near in a bakery and other employees were in the building near a heavily traveled intersection created a great risk of death to many persons.

The court found that the trial court had erred in making the finding that the defendant had created a great risk of death of many persons. The Florida Supreme Court held:

> When the legislature chose the words with which to establish this aggravating circumstances, it indicated clearly that more was contemplated than a showing of some degree of risk of bodily harm to a few persons. "Great risk" means not a mere possibility but a likelihood or high probability. The great risk of death created by the capital felon's actions must be to "many" persons. By using the word "many", the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance. We hold that the trial court erred in finding that the appellant created a great risk of death to many persons.
>
> Id. at 1009-10

See also, Lewis v. State, 377 So.2d 640 (Fla. 1979).

The trial court's reliance on the tape recordings as constituting a "great risk of death to many persons" is misplaced because the publication of the tape recordings was not part of the res gestae of the Orlando murder. It is only conduct surrounding the capital felony for which a defendant is being sentenced which properly may be considered in determining whether a defendant created a "great risk of death to many

person". Elledge v. State, 346 So.2d 998 (Fla. 1977). In this case, the publication of the tapes were remote in time, and therefor, should not have been considered as an aggravating circumstance.

The Florida Supreme Court, in its original decision in this case, found that the trial court noted five aborted attempts to select a victim from the streets of Jacksonville before Orlando was chosen; the court approved the finding of the aggravating circumstance. A renewed, thorough examination of the construction placed on this circumstance does not justify that finding.

In its original opinion, the Florida Supreme Court found:

> The trial judge here painstakingly and with reasoned judgment detailed the factors which caused his departure from the jury's recommendation. His thorough analalysis is precisely the type we would expect from mature, deliberative judges in this state. It suggests why the Legislature put the trial judges of Florida in the middle of the sentencing process for capital cases.
>
> **Barclay v. State,**
> **343 So.2d 1271**

It is critical for this Court to review the trial court's sentencing order to understand the extent this trial judge allowed his personal feelings to intrude into the setencing procedure. (See Appendix and).

The trial jury in this case recommended petitioner receive a life sentence; the trial court and Florida Supreme Court did not follow that recommendation. In affirming petitoner's death sentence, the Supreme Court praised the trial judge:

> "The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specificity as to the relevance and weight to be accorded each. . . "
>
> **Barclay v. State**
> **343 So.2d 1270.**

In Proffitt v. Florida, supra, this Court found the Florida capital sentencing procedure to meet the constitutional test; however, since Proffitt, the Florida Supreme Court has failed in its duty to "review and reweigh the aggravating and mitigating circumstances to determine independently whether the ultimate penalty is warranted. It should be apparent that, in this case, there was no meaningful review.

Where discretion is afforded a sentencing body on a matter so grave as the determination as to whether a human life should be taken or spared, that discretion

must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 187 (1976). One can perhaps understand the trial court's misapplication of the three aggravating circumstances and the one nonstatutory aggravating circumstance in this case in his zeal to give the petitioner the death penalty; but one cannot excuse the Florida Supreme Court for its failure to correct the trial court's error and to "suitably direct and limit the discretion" of trial judge's in Florida. In this case, the Florida Supreme Court has engaged in precisely the "cursory or rubber stamp review" that the joint opinion in Proffitt trusted would not occur.

The Florida courts, in the application of the Florida capital sentencing procedure in this case, has exhibited blatant disregard for the standards devised to regulate imposition of the death penalty and has called into question the very basis for this court's approval of that procedure in Proffitt. This Court should grant the Petition for Certiorari.

POINT TWO

WHERE A DEATH PENALTY IS IMPOSED ON A PLURALITY OF AGGRAVATING CIRCUMSTANCES, OF WHICH THREE IS INVALID AND ON A NONSTATUTORY AGGRAVATING CIRCUMSTANCE, THE DEATH PENALTY SHOULD BE SET ASIDE.

This case presents a clear and direct conflict between the Florida Supreme Court and this Court.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court upheld the constitutionality of the Florida death penalty sentencing procedure. In footnote 8 of that opinion, this Court stated:

> "In one case, the Florida Court upheld a death sentence where the trial court had simply listed six aggravating factors as justification fr the sentence he imposed. Sawyer v. State, 313 So.2d 680 (1975). Since there were no mitigating factors, and since some of those aggravating factors arguably fell within the statutory categories it is unclear whether the Florida Court would uphold a death sentence that rested entirely on nonstatutory aggravating circumstances. It seems unlikely that it would do so since the capital sentencing statute explicitly provides that '(a) aggravating circumstances shall be limited to the following (eight specified factors); section 921.141(5) (Supp. 1976-1977). (Emphasis added). There is no such limiting language introducing the list of statutory mitigating factors. . ."

The law in Florida is well settled that a death sentence will be affirmed by the state supreme court so long as there is at least one statutory aggravating circumstance and there are no mitigating circumstances, although the sentence was predicated in part upon nonstatutory aggravating circumstances and/or improperly found statutory aggravating circumstances. Elledge v. State, 346 So.2d 998, (Fla. 1977); Hargrave v. State, 366 So.2d 1, (Fla. 1979), Demps v. State, 359 So.2d 501 (1981), Armstrong v. State, 399 So.2d 953, (Fla. 1981); Sireci v. State, 399 So.2d 964 (Fla. 1981) Tafero v. State, 403 So.2d 355 (Fla. 1981); Francois v. State, 407 So.2d 885, (Fla. 1982). This Florida rule is based on footnote 8 of Proffitt v. Florida:

> "It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating circumstances where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated byour statute." Elledge v. State, 346 So.2d at 1002-03 (Fla. 1977); Demps v. State, 395 So.2d 506 (Fla. 1981).

In point one, petitioner has demonstrated that the trial court considered one nonstatutory aggravating factor - petitioner had a prior criminal record - and that the trial judge erroneously found three statutory aggravating circumstances to exist: petitioner was under sentence of imprisonment; petitioner created a great risk of death to many persons; petitioner had previously been convicted of a felony involving the use of threat of violence to another. The presence of the nonstatutory aggravating circumstances and the erroneous application of three other aggravating factors permitted arbitrary and discretionary influences into this sentence as to violate petitioner's Fourteenth Amendment Rights.

Certain principles affirmed by this court establish the violation of petitioner's constitutional rights. An unbroken line of cases since Furman v. Georgia, 408 U.S. 238 (1972), requires any state wishing to impose a capital sentence to channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a death sentence. Godfrey v. Georgia, 446 U.S. 420 (1980). Special capital sentencing requirements derive from the Court's recognition that there is a significant constitutional difference between the death penalty and lesser punishments. Beck v. Alabama, 447 U.S. 625 (1980); this

qualitative difference calls for a greater degree of reliability when the sentence of death is imposed. Lockett v. Ohio, 437 U.S. 586 (1978).

The consideration by the trial judge in this case of the nonstatutory aggravating factor and the three invalid statutory circumstances violated each of these procedural requirements. The erroneous consideration by the trial judge here is identical with the consideration by the jury in Zant v. Stephens, _____U.S. _____(1982) of an unconstitutional aggravating circumstance. The Fifth Circuit Court of Appeals found that because of the consideration by the Stephens jury of the unconstitutional aggravating circumstance, it could not be determined with the degree of certainty required in capital cases that the evidence of those convictions together with the instructions did not make a critical difference inthe jury's decision to impose death. Stephens v. Zant, 631 F.2d 397 (1980). The same considerations apply to the death sentence imposed on petitioner.

In Proffitt v. State, supra, this Court found:

> "The Florida capital - sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary and capricious manner. Moreover to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumsances is reviewed and reweighed bythe Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted'. . . Proffitt v. State, supra, at 252-53.

As can be seen by the sentencing order and the Florida Supreme Court's opinion in this case, this Court's confidence in the Florida capital sentencing procedure was misplaced. The adoption of the rule of Elledge v. State, supra, has introduced arbitrariness and capriciousness into the Florida death - sentencing procedure. Unlike the situation in Zant v. Stephens, _____ U.S. _____ (1982), this Court does not have to question whether the Florida Supreme Court will sustain a death penalty as long as one of a plurality of aggravating circumstances found by a judge is valid and supported by the evidence.

Although this Court has not decided the Zant v. Stephens, supra, issue on the merits, the sentencing infirmities addressed in Zant by this Court are identical to the infirmities in the Florida capital - sentencing procedure as applied to this case. This Court should grant this petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petiton for Writ of Certiorari has been furnished to the Attorney General's Office by mail this 14th day of June, 1982.

Elwood Barclay

Elwood Barclay, in proper person
437 East Monroe Street
Jacksonville, Florida 32202

81 6908

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RECEIVED
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SUPREME COURT, U.S.

Edward Clark BARCLAY and Jacob John Dougan, Jr., Appellants,

v.

STATE of Florida, Appellee.

No. 47200.

Supreme Court of Florida.

March 17, 1977.

Rehearing Denied April 7, 1977.

Defendants were convicted in the Circuit Court, Duval County, R. Hudson Oliff, J., of murder in first degree and sentenced to death and they appealed. The Supreme Court held that statutes authorizing imposition of death penalty on those convicted of first-degree murder and adopting new capital-sentencing procedure are not unconstitutional nor were they unconstitutionally applied to defendants; that defendants were properly tried in Duval County in which victim got into defendants' car, although killing occurred in another county, and that trial judge properly rejected contention that one of defendants received his sentence.

Affirmed.

Boyd, J., concurred specially with an opinion.

Hatchett, J., concurred in part and dissented in part with an opinion.

1. Homicide ⇐351

Florida statutes authorizing imposition of death penalty on those convicted of first-degree murder and adopting new capital-sentencing procedure are not unconstitutional and were not unconstitutionally applied to defendants convicted of first-degree murder of hitchhiker randomly chosen as victim. West's F.S.A. §§ 782.04, 921.141.

2. Criminal Law ⇐112(6)

Defendants were properly tried for first-degree murder in county in which hitchhiker victim got into their car, even though he was killed in another county. West's F.S.A.Const. art. 1, § 16; West's F.S.A. § 910.05.

3. Criminal Law ⇐706(3)

Defendants convicted of first-degree murder were not denied fair and impartial trial on basis that prosecuter failed to reveal on direct examination complete details of plea bargain agreement with witness in exchange for his testimony, where defense counsel, although aware of agreement, did not ascertain whether any bargain had been made and did not cross-examine him to shake his credibility because of plea bargain agreement.

4. Homicide ⇐334

Imposition of death penalty for first-degree murder was appropriate, where defendant, who was age 27 at the time, was not under mental or emotional disturbance or duress or dominance of another person and had full capacity to appreciate criminality of his conduct and to conform his conduct to the law and he conceived and planned especially heinous, atrocious and cruel murder. West's F.S.A. § 921.141(6).

5. Criminal Law ⇐983

Although jury recommended that one of two defendants convicted of first-degree murder be sentenced to death and the second defendant be given life sentence, trial judge's imposition of death sentence on both was appropriate, where they participated equally in the crime and variation between the defendants were nominal, a minor age difference. West's F.S.A. § 921.141(6).

Ernest D. Jackson, Sr., of Jackson & Nicks, Jacksonville, for appellants.

Robert L. Shevin, Atty. Gen., and William K. Allbritton, Asst. Atty. Gen., for appellee.

PER CURIAM.

We have for review on direct appeal from the Circuit Court of Duval County, judgments of guilty of murder in the first degree and sentences of death. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

Appellants were indicted for the first degree murder of Stephen Anthony Orlando, were found guilty by a jury who after advisory hearing recommended that the death sentence be imposed as to Dougan and that life imprisonment be imposed as to Barclay,[1] were convicted and sentenced to death.

As evidenced by the sentencing order of the trial judge and supported by the record, the facts surrounding the slaying which the judge characterized as a random, racial hate murder are as follows:

"The essential facts as brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the 'BLACK LIBERATION ARMY' (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

"The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty two caliber pistol and a knife with the intent to kill a 'devil'. The devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

"That as they drove around the City of Jacksonville they made several stops and observed white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote out a note which was to be placed on the body of the victim ultimately chosen for death.

"Eventually the five men headed for Jacksonville Beach where they picked up a hitch hiker, eighteen year old, Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife. Dougan then put his foot on Orlando's head and shot him twice—once in the chest and once in the ear killing him instantly. Crittendon and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

"The evidence showed that none of the defendants knew or had ever seen Orlando before, they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

"'Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.'

"Early the following morning the dead body of Stephen Anthony Orlando was

1. As to Barclay, the jury recommended life by a vote of seven to five

discovered—police were called to the scene and the knife and note were preserved for evidence and photographs were taken of the dead body and surrounding area. An F.B.I. document and handwriting expert compared the death note with other handwriting of Dougan and testified that they were both written by the same person.

"Subsequent to the murder the defendants Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the Mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all—as follows:

"'Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed. . . .

"'If you want to know how to spell 'Americans,' just spell it with three Ks instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so the black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again.' Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods . . . .'

"'Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom . . . .'

"'You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and your National Guards and you spray black people with all that tear gas and you just take advantage of black people . . . .'

"'We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offsprings, those things, those stringy-haired things you call your kids . . . You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain . . . .'

"'The reason Stephen was only shot twice in the head was because we had a five pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes . . . .'

"'He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on those people, my people.

"'We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla.'

"All of the tapes ended, 'Signed, Your Black Liberation Army.'"

In detail, the Judge explained each of the aggravating and mitigating circumstances defined by statute and their application to the instant cause, and concluded that the death penalty was the appropriate punishment for appellants. As to the aggravating circumstance of heinousness or atrocity of the crime, the trial judge stated:

"The defendants, Barclay and Dougan, together with others premeditatedly and deliberately stalked their victim and brutally murdered him.

"The victim's only crime was that he was of a different racial group than his murderers. That he in no way offended them nor did he even know them before that fatal evening.

"The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head at close range.

"In addition to an unprovoked, premeditated murder—it was a declaration of war against a racial group—with the promise of more violence, death and revolution to come.

"Such acts of the defendants were of the basest, most callous, homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrators."

We have carefully considered each of the numerous points raised on appeal by appellants and find that none of them constitute reversible error.

[1] Sections 782.04 and 921.141, Florida Statutes, are not unconstitutional nor were they unconstitutionally applied to appellants. *State v. Dixon*, 283 So.2d 1 (Fla. 1973), *Alford v. State*, 307 So.2d 433 (Fla. 1975), and *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, decided July 2, 1976.

Relative to appellants' argument that they were denied the right to be tried in the county where the crime occurred, we initially note the following excerpt from the record taken from the hearing on motion for new trial:

"THE COURT: Insofar as the motions made by Mr. Jackson are concerned, the Court ruled upon the issue of the trial in Duval or St. Johns County, finding from the evidence that the incident occurred in Duval County, culminated in St. Johns County; read the specific statute with further instructions to the jury as to that particular aspect of the law. There has been no motion for change of venue insofar as St. Johns County was concerned or motion for change of venue to any other county. The evidence showed that the defendant got in the car, whether it was an abduction, kidnapping or whatever, it started in Duval County and then culminated in St. Johns County."

[2] The indictment charged that appellants "in the County of Duval and the County of St. Johns, State of Florida, unlawfully and from a premeditated design . . . did kill the said Stephen Anthony Orlando." The State cites the Court to Article I, Section 16, Florida Constitution, providing:

"If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient."

and Section 910.05, Florida Statutes, providing:

"If the acts constituting one offense are committed in two or more counties, the offender may be tried in any county in which any of the acts occurred."

Appellants were properly tried in Duval County, for the reasons well expressed by

Judge Smith with respect to one of Dougan's and Barclay's co-ventures. *Culbreath v. State*, 336 So.2d 1169, opinion filed October 11, 1976 (Fla. 1st DCA).

[3] Appellants contend that they were denied a fair and impartial trial because the prosecutor failed to reveal on direct examination complete details of a plea bargain agreement with a witness in exchange for his testimony. The State emphatically denies that the prosecution ever at any time deliberately and intentionally withheld any of witness Hearn's statement. No false testimony was given in this regard as is suggested by appellants. During the motion for new trial, appellants charged that the State willfully refused to disclose the full plea bargain agreement on direct examination. To this charge, State Attorney Austin expressly objected, as follows:

"MR. AUSTIN: Your Honor, I'm—just a minute. I'm just going to make an objection that that's a bad faith argument; that this lawyer knows if Hearn had opened his mouth about the second murder it would have been a mistrial, and he knows it and he had a perfect right to cross examine on it. He didn't open the door because he knows it would prove that his man was guilty of two murders instead of one to the same jury, and I'll submit that it's a bad faith argument."

Although completely aware of the agreement, defense counsel never inquired of the subject State witness as to any bargain or deal or representations made to him by the State Attorney's office, nor did he on cross examination attempt to shake the credibility of this witness because of the plea bargain agreement mentioned on direct examination. Defense counsel, on cross examination, did not even mention the agreement that had been elicited on direct examination. As is clearly evidenced by the record, without question, defense was fully aware of the full plea bargain agreement. At the insistence of defense counsel, the deposition of Hearn was taken on January 31, 1975, at 10:20 a. m. in the Duval County Courthouse at which time Hearn testified fully to the details of the agreement thereby apprising the defense of the same.

Appellants raise several other points on appeal none of which we find to be meritorious so as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and pursuant to Rule 6.16(b), Florida Appellate Rules, we have also reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and that the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

Having determined that no reversible error has been made to appear which would require a new trial, we must proceed to examine whether the death sentences imposed by the trial judge were appropriate under the peculiar circumstances of this case.

The jury in these cases distinguished between the appellants in presenting their recommendations for sentence, suggesting life imprisonment for Barclay and a death penalty for Dougan. It is particularly important, therefore, that we explain our decision to uphold the recommendation of the trial judge that both be executed.

[4] The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating circumstance listed in the death penalty statute, and he commented with specificity as to the relevance and weight to be accorded each. He noted as to Dougan that no mitigating circumstance pertained to his benefit, and that one of those factors actually suggested an aggravation rather than mitigation of sentence.[2] Dougan, who was age 27 at the time, had no significant history of prior criminal activity, was not (and did not claim to be) under a mental or emotional disturbance, was not (and did not claim to be) under duress or the dominance of anoth-

2. See Section 921.141(5), Fla.Stat. (1975).

Judge Smith with respect to one of Hearn's and Barclay's co-venturers. *Cottingham v. State*, 338 So.2d 1099, opinion filed October 11, 1976 (Fla. 1st DCA).

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Appellants raise several other points on appeal none of which we find to be meritorious so as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and pursuant to Rule 6.16(b), Florida Appellate Rules, we have also reviewed the evidence to determine whether the interests of justice require a new trial, with the result that we find no reversible error is made to appear and that the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

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2. See Section 921.141(6), Fla.Stat. (1975).

or person and had (and did not deny having) full capacity both to appreciate the criminality of his conduct and to conform his conduct to law. The trial judge further found that Dougan's victim was not a participant in the episode and had not consented to the act, but that Dougan was an accomplice with four others in this crime and had a dominant, as opposed to minor role, in its accomplishment. It was Dougan who conceived and planned the events that occurred. Each of these findings is well documented in the record of Dougan's trial.

As to aggravating circumstances relative to Dougan, the trial judge recited that four factors essentially had no relevance here.[3] Four others were present to some degree, namely that Dougan's crime had created a great risk of death to many persons[4], had been committed while engaged in a kidnapping, had endeavored to disrupt governmental functions and law enforcement[5], and had been especially heinous, atrocious and cruel.[6] These findings are also well documented in the record before us. On balance, there is no doubt that the recommendation of the jury and the sentence of the trial judge are appropriate in this case.

[3] As regards Barclay, who had received a life recommendation from the jury, virtually the same considerations apply with respect to consequences of the criminal episode. Different personal factors pertain, however. He was 23 rather than 27 years old, but had amassed a significant history of prior criminal activity. His participation, like Dougan's, was found by the trial judge not to be minor, as he was the first to assault the victim and then stab him repeatedly. The jury obviously weighed these differences somewhat differently than the trial judge.

When there is disagreement between the jury and judge after both have evaluated the same data, we have said the jury's recommendation should generally prevail.[7] In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld.[8] Two perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being an eighteen (a minor age difference but no suggestion of different maturities), the facts here do not warrant the dispensation of unequal justice. *See Mosser v. State*, 330 So.2d 137 (Fla.1976); *Slater v. State*, 316 So.2d 539 (Fla.1975). "Equal Justice Under Law" is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized. This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.

Accordingly, the judgments and sentences of the trial court are hereby affirmed.

It is so ordered.

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2. Dougan was not under sentence of imprisonment, was not attempting to avoid arrest or escape custody, had not been previously convicted of a major felony, and his actions did not involve the use of a firearm.

4. The trial judge noted five shotgun blasts to subject a victim from the streets of Jacksonville before Stephen Orlando was chosen, plus the taped threat made to white Jacksonville citizens that a race war had begun and none would be safe.

5. The basis for this finding was the judge's observation that the nature of a race war essentially threatened the foundations of American society.

6. Dougan's tapes explained how Stephen Orlando had begged for his life while being beaten and stabbed before Dougan "executed" him with two pistol shots to the head.

7. Tedder v. State, 322 So.2d 908 (Fla.1975).

8. The trial judge here painstakingly met with reasoned judgment detailed the factors which caused his departure from the jury's recommendation. His thorough analysis is precisely the type we would expect from mature, deliberative judges in this state. It suggests why the Legislature put the trial judges of Florida in the middle of the sentencing process for capital cases.

OVERTON, C. J., and ADKINS, ENGLAND and ROBERTS (Retired), JJ., concur.

BOYD, J., concurs specially with an opinion.

HATCHETT, J., concurs in part and dissents in part with an opinion.

BOYD, Justice, concurring specially.

The jury found both Appellants guilty of murder in the first degree, but recommended death by electrocution for Appellant Dougan and a sentence of life imprisonment without eligibility for parole during the first twenty-five years for Appellant Barclay.

A careful review of the entire record convinces me the jury was correct in recommending a higher degree of punishment for Appellant Dougan than for Appellant Barclay. Appellant Dougan was the architect of this atrocity, planned the crime and lured his heroin students on the night of the murder, directed the course of the auto trip of the defendants and selected the victim to be killed. Appellant Barclay was a principal and is guilty of murder, but he was a follower who did exactly what he was told to do by Appellant Dougan and I feel that he should be granted a life sentence rather than death. Dougan fully deserves electrocution.

HATCHETT, Justice, concurring in part and dissenting in part.

The murder in this case was heinous, atrocious, cruel, and cold, senseless.

Section 921.141, Florida Statutes (1975), "intended as it was ... to meet the constitutional infirmity of capital sentencing procedures explored in *Furman* v. *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), is designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." *Provence* v. *State*, 337 So.2d 783 (Fla.1976). In a capital case a judicial officer must evaluate the conduct of the defendant by weighing specifically enumerated aggravating and mitigating circumstances, taking into consideration prior judicial treatment of similar situations. The aggravating circumstances are limited to those listed in the statute.

The record in this case shows that the trial judge went beyond the statute and considered additional factors outside the record, including his own personal experiences, thus upsetting the balance mandated by the statute. We cannot properly perform our duty of review in capital cases and ensure uniform imposition of the death penalty if trial judges are allowed to supplement the list of factors found by the legislature to be determinative.

For this reason I would affirm the conviction and remand the case to the trial judge for the entry of sentences in accordance with Section 921.141, Florida Statutes, under the authority of *Miller* v. *State*, 332 So.2d 65 (Fla.1976), and *Messer* v. *State*, 330 So.2d 137 (Fla.1976).

Supreme Court of Florida

No. 47,260

ELWOOD CLARK BARCLAY, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[June 4, 1981]

PER CURIAM.

This case returns to us following our remand to the trial court in order to provide Barclay an opportunity to rebut or explain matters appearing in a presentence investigation report (PSI). Barclay v. State, 362 So.2d 657 (Fla. 1978). Before that remand, Barclay's conviction and sentence for first degree murder had been affirmed by this Court,[1] and review of that action had been denied by the United States Supreme Court.[2]

On remand Barclay was afforded several evidentiary hearings and argument of counsel. Only one witness was called on Barclay's behalf at the first hearing, principally to portray Barclay's lesser role in the events surrounding the murder, and to comment on a second murder with which he was not involved. At a second hearing, Barclay's counsel argued extensively against the reimposition of the death penalty, but offered virtually no evidence in derogation of the information contained in the PSI. The trial judge concluded during a later sentencing proceeding

1. Barclay v. State, 343 So.2d 1266 (Fla. 1977).

2. Barclay v. Florida, 439 U.S. 892 (1978).

that he had "carefully considered all of those matters presented by the defendant in response to the presentence investigation report, and [found] nothing in such responses which mitigates any circumstance herein." Our independent review of the record in this case completely supports this conclusion.

Barclay now challenges the reimposition of a death sentence, primarily by argument against the findings previously reviewed here and affirmed. We cannot accept counsel's suggestion that we abrogate the "law of the case". See Duncan v. State, No. 47,260 (Fla. April 9, 1981). The dictates of Gardner v. Florida, 430 U.S. 349 (1977), have been met, and no defect in the original sentencing order has been identified as stemming from improper material in the PSI. There being no reason to reconsider the matters previously analyzed, we again affirm the trial judge's sentence of death.

It is so ordered.

ADKINS, Acting Chief Justice, BOYD, ENGLAND and ALDERMAN, JJ., Concur
OVERTON and McDONALD, JJ., Dissent

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Duval County,

R. Hudson Olliff, Judge - Case No. 74-4139-CF

Kenneth Vickers and Steven E. Rohan of Vickers and Rohan, Jacksonville, Florida,

for Appellant

Jim Smith, Attorney General, and Wallace E. Allbritton, Assistant Attorney General, Tallahassee, Florida,

for Appellee

Supreme Court of Florida

WEDNESDAY, APRIL 14, 1982

ELWOOD CLARK BARCLAY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 47,260

Circuit Court No. 74-4139-CF
(Duval)

There not being four (4) votes to rehear, the Motion for Rehearing filed in the above case is hereby denied.

ADKINS, Acting C.J., BOYD and ALDERMAN, JJ., would deny rehearing
OVERTON, McDONALD and EHRLICH, JJ., would grant rehearing

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By Tanya Carroll
Deputy Clerk

TC
cc: Hon. S. Morgan Slaughter, Clerk
Hon. R. Hudson Olliff, Judge

Wallace E. Allbritton, Esquire
Kenneth Vickers, Esquire

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SUMMARY OF PROCEEDINGS

That because there has been a lapse of approximately five years since I originally imposed sentence upon this defendant - it may be well to summarize the facts from indictment to the date hereof - for the benefit of review by the Florida Supreme Court.

1. On September 26, 1974, the defendants, ELWOOD CLARK BARCLAY, JACOB JOHN DOUGAN, DEVNE CRITTENDON and BRAD W. EVANS, were indicted for murder in the first degree, as follows:

"IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, SPRING TERM, ONE THOUSAND NINE HUNDRED AND SEVENTY-FOUR

STATE OF FLORIDA

vs.

JACOB JOHN DOUGAN, JR.,
ELWOOD CLARK BARCLAY,
DEVNE CRITTENDON and
BRAD W. EVANS

INDICTMENT FOR

MURDER IN THE FIRST DEGREE

74-4139

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that JACOB JOHN DOUGAN, JR., ELWOOD CLARK BARCLAY, DEVNE CRITTENDON and BRAD W. EVANS, on the 17th day of June, One Thousand Nine Hundred and Seventy-Four, in the County of Duval and the County of St. Johns, State of Florida, unlawfully and from a premeditated design to effect the death of Steven Anthony Orlando, did kill the said Steven Anthony Orlando, by shooting him to death with a pistol, contrary to the provision of Section 782.04, Florida Statutes."

2. On March 5, 1975, the defendants, Barclay, Dougan, Crittendon and Evans were convicted by Jury, as follows:

Barclay - guilty of murder in the first degree

Dougan - guilty of murder in the first degree

Crittendon - guilty of murder in the second degree

Evans - guilty of murder in the second degree

3. The jury - in its advisory sentence - recommended life imprisonment for Barclay by a vote of seven to five.

4. The jury - in its advisory sentence - recommended death for defendant Dougan by a vote of ten to two.

5. That the defendants Crittendon and Evans were sentenced by this Court to one hundred and ninety-nine years in the Florida State Prison in case 71-1139. The defendants, Crittendon and Evans also pleaded guilty in case 71-4140 and were sentenced by this Court for that case also. That subsequently the conviction and sentence of Crittendon was affirmed. (See 388 So.2d 1088.) Evans did not pursue appeal.

6. On April 10, 1975, this Court sentenced both Barclay and Dougan to death.

7. On March 17, 1977, the Florida Supreme Court affirmed the conviction and sentence of both Barclay and Dougan. (See 343 So.2d 1266.)

8. On September 7, 1978, the Florida Supreme Court vacated the death sentences and ordered this Court to hold a

hearing (as provided in Gardner v. Florida, 430 U.S. 349) at which the defendants would have an opportunity to rebut any information contained in the presentence investigation report - including any confidential or other parts thereof. (See 362 So.2d 657.)

9. On October 10, 1978, the United States Supreme Court denied certiorari to defendants Barclay and Dougan. (See 99 Supreme Court Reporter 249.)

10. That after the case was remanded to this Judge in September of 1978, Mr. Ernest Jackson, attorney for both defendants, Barclay and Dougan, was granted a number of continuances due to his terminal illness - and eventually he withdrew from representation of defendants.

11. This Court then appointed private attorney Mr. Ken Vickers to represent Barclay and Mr. Randolph Fallin to represent Dougan. That both Mr. Vickers and Mr. Fallin are skilled attorneys with wide experience in capital cases. That several continuances were granted defendants while Mr. Fallin and Mr. Vickers represented them.

12. That eventually the defendant Dougan dismissed his Court appointed attorney, Randolph Fallin, and retained the services of Joseph Nursey of the Team Defense Project, Inc., of Atlanta, Georgia. That such late entry of Mr. Nursey caused additional delay as to both defendants.

13. Subsequently both the defendants, Barclay and Dougan, filed motions to sever their cases one from the other. Such motions were granted and each responded to the presentence investigation report in separate proceedings on different dates.

Subsequently the defendant Dougan was resentenced and this Court now sentences defendant Barclay.

SENTENCE TECHNIQUE

In the sentence of April 10, 1975, this Court sentenced both the defendants, Barclay and Dougan, in one written sentence.

During the Gardner relief proceedings, both defendants made motion for - and were granted - a severance so that their responses to PSI and sentences would be separate and apart from one another.

That, accordingly, this Court has sentenced each separately. However, because both were involved in and convicted of the same crime and their participation was so entwined - one with the other - that a thorough and complete sentence could not be imposed on either without periodic reference to the other.

COMMENTS OF JUDGE

This present case is one of the rarest types of crimes to come before this Court or any Court. The facts at trial proved that it was a PREMEDITATED - RACIAL - HATRED MURDER. The hapless victim was chosen at random, stalked and brutally murdered ONLY because he was defenseless and because he was of a DIFFERENT racial group than his murderers.

After the crime, tapes were made by the murderers wherein they described the killing and the agony of the victim. These boastful tapes were cruelly mailed to the mother of the murdered boy and to local T.V. and radio stations - bragging of the murder and announcing that it was the start of a revolution and promised further violence. One part of the tapes said "White people prepare yourself to die". It was a call for, and an attempt to start a racial war.

Such ravings could only be from a depraved homicidal mind.

Similar sentiments were violently uttered on another continent in our own recent history. During World War II, I was among some of the first American Combat Parachute Infantry Soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly, the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like cord wood - to be buried or burned in the ovens.

Those people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were murdered because they were all guilty of the same crime - they were different from those people who murdered them. They were either of a different

race, culture, religion or political belief. That was their only crime - they were different. Surely we must have learned some lasting lesson from that tragic holocaust.

The law does not require that we like each other - nor is it illegal to have prejudices - but it is unlawful to do injury to another person because of that hate and prejudice.

This type of random, racial - hate murder, is almost impossible to believe. Animals hunt and kill for food and, in time of war, men kill in self defense those who would kill them. But, to premeditatedly pick a victim at random - a person not even known to his murderers - and who was chosen for death only because he was guilty of being of a different race - is heinous, atrocious, cruel and an unthinkable crime. The crime itself was horrible, but the attempt to incite racial war and a mass bloodletting - compounded the heinous quality of the murder.

We do not have to like each other - but we must respect the rights of others and we must either live together - or surely we will die together.

Jacksonville and, indeed, the nation has made great progress in race relations and understanding over the last few years. But you, who have committed this racial - hatred murder, have done more to disrupt those good relations and progress than any other one factor in recent time.

You have done a gross disservice to both the black and white citizens of this City. You have given fuel to those who want to think the worst of the people of your race - and you have caused consternation and disgust amongst both blacks and whites of good will who are most anxious to help us achieve a society of equality.

Until your arrest - terror stalked the streets of this City - and it was only due to the good will of both our black and white citizens that order prevailed and further violence and retaliatory acts were not committed.

Nothing good has, or ever will, come from the murder of Stephen Anthony Orlando, but the tragic slaughter of this eighteen year old youth can be used as an example of the monumental stupidity of racial - hatred murder.

OUTLINE OF THE ESSENTIAL FACTS

The essential facts as brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the "BLACK LIBERATION ARMY" (BLA) and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

The testimony shown that on the evening of June 17, 1974, Barclay, Dougan, Crittendon, Evans and Hearn set out in a car armed with a twenty-two caliber pistol and a knife with the intent to kill a "devil" - the devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

That as they drove around the City of Jacksonville they made several stops and observed a number of white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote a note - which was to be placed on the body of the victim ultimately chosen for death.

Eventually the five men headed for Jacksonville Beach where they picked up a hitchhiker, eighteen year old Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay struck the first homicidal blow by repeatedly stabbing him with a knife. Dougan then put his foot on Orlando's head and shot him twice - once in the cheek and once in the ear. Crittendon and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

> *"Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people."*

Early the following morning, the dead body of Stephen Anthony Orlando was discovered. Police were called to the scene and the knife and note were preserved for evidence and photos were taken of the dead body and surrounding area.

Subsequent to the murder - the defendants, Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all - as follows:

"Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed..."

"If you want to know how to spell 'Americans', just spell it with three K's instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so that black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again'. Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods..."

"Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom..."

"You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and your National Guards and you spray black people with all that tear gas and you just take advantage of black people..."

"We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offspring, those things, those stringy-haired things you call your kids..."

"You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain..."

"The reason Stephen was only shot twice in the head was because we had a five pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes..."

"He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people..."

"We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla."

All of the tapes ended with the words "Signed, Your Black Liberation Army".

William Hearn, one of the five persons present at the murder of Orlando, testified that he witnessed the murder and told of the participation of Barclay, Dougan, Evans and Crittendon - and he, together with witnesses Jimmy Mattison, Edred Black and Otis Bess, Jr., stated that they were present when the boastful tapes were made and they identified the voices of Barclay and Dougan when the tapes were played to the jury.

In defense, Barclay admitted making the tapes for political reasons - but denied any participation in the murder. Dougan also denied the murder and the death note - but admitted he made the tapes based on newspaper accounts of the crime. He said that the purpose of the tapes was to dramatize the plight of black people. Each defendant had alibis as to his whereabouts at the time of the murder, but the jury found them all guilty of murder.

The jury found both Barclay and Dougan guilty of murder in the first degree and in its advisory sentence the jury recommended death for Dougan by a vote of ten to two. In its advisory sentence the jury recommended life imprisonment for Barclay by a seven to five vote.

That thereafter this Court denied motions for a new trial and adjudged each guilty of murder in the first degree.

EXPLANATION

Before imposing the sentence for Murder in the First Degree, this Judge has considered those matters brought out by the defendant, Mr. Barclay, in his responses to the PSI. The Court has also closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in the Florida Statutes and which were guidelines for the jury in considering its advisory sentences.

The Court has summarized the facts as brought out in the trial, in the presentence reports, in defendant's response to the presentence report and has applied them to each element of aggravation and mitigation where applicable.

The elements of Aggravation and Mitigation have been summarized below in reverse order.

SUMMARIZATION OF MITIGATION ELEMENTS

A. WHETHER DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

FACT:

The defendant, Barclay, has an extensive criminal record of seven prior arrests. It shows that he had previously been on probation for the crime of uttering a forgery, and that subsequently that probation was revoked and he was sentenced to a term of six months County Jail. It also shows that he had previously been on five years probation for the crime of Breaking and Entering and Grand Larceny. There are also a number of misdemeanor crimes charged. (See PSI)

CONCLUSION:

There is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record showing at least one prior felony conviction and one prior felony probation.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

FACT:

That Barclay raised no defense of insanity or emotional instability. He had an alibi

for the time of the crime and proclaimed his innocence. Nor was there any evidence from the PSI that he suffered emotional disturbances in the past or at the time of trial. In the proceedings for response to the PSI there was no evidence or testimony that he was under the influence of extreme mental or emotional disturbance at the time of the murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is no evidence of extreme mental or emotional disturbance in the past, at the time of the murder - or at the time of trial.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE CONDUCT OF THE DEFENDANT OR CONSENTED TO THE ACT

FACT:

The defendant Barclay, together with Dougan, Crittendon and Evans, had previously decided upon a course of homicide and were looking for a victim when they spotted Stephen Anthony Orlando and offered him a ride. There was evidence and testimony that the victim urged they take him to a house - so that he could get out and away from his abductors. Instead, he was taken to a trash dump and there the unarmed youth was ordered out of the car - knocked to the ground - stabbed repeatedly by Barclay and shot by Dougan.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant Barclay and the others intended to kill Orlando at the time he got into the car. Orlando could not, and would not, in any way, consent to his own murder, and in fact, begged for mercy - all in vain.

D. WHETHER DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR

FACT:

The participation by Crittendon and Evans was lesser in degree and they have been adjudged guilty of murder in the second degree and each sentenced to 199 years imprisonment.

FACT:

Both Barclay and Dougan were the major and primary participants in the murder. The evidence shows that the homicidal assault was initiated by Barclay who threw the victim to the ground and repeatedly stabbed him in the chest with a knife - as Orlando pleaded for his life. Then Dougan rendered the Coup De Grace by shooting the victim twice in the head.

A close attention to Barclay's boastful remarks on the tapes will lead any listener to conclude that he was a major participant and proud of that participation. Had Dougan been the only major

participant - then perhaps Orlando, who was struggling for his life, might have been able to escape. But Barclay and Dougan acting in concert overpowered, stabbed and shot their common prey.

FACT:

The evidence showed that Barclay struck the first homicidal blow of the murder by repeatedly stabbing the victim. Dougan was the originator of the plan and twice shot the helpless captive after Barclay put the killing in motion - but it was the two of them acting in concert - who were the primary culprits. Crittendon and Evans were lesser participants - which fact was recognized by the jury finding Dougan and Barclay guilty of murder in the first degree and the others guilty of second degree murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to Barclay - who initiated the homicidal frenzy and was a major participant in the murder while acting in concert with Dougan.

E. WHETHER DEFENDANT ACTED UNDER EXTREME DURESS OF UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

FACT:

Never, at any time, in any way, was it shown that any of the defendants acted under duress

of any kind. The defendant, Barclay, had a criminal record of seven arrests - showing a felony conviction, a misdemeanor conviction and a felony probation. He is, or was, a married man with several children. He had gone through senior high school and was of average, or above, intelligence. It was not contended by Barclay that he was under substantial domination of Dougan or any other person. Had such dominance been apparent, then perhaps the jury would have found Barclay guilty of a crime less than first degree murder.

FACT:

That in the responses to the presentence report the defense attorney adduced testimony from the lead investigating officer in the murder - and that officer named Barclay as second in command of the members of the Black Liberation Army. He stated that in his opinion both Barclay and Dougan exerted influence over the other members of the gang. He further stated on cross examination by the State Attorney that Barclay had leadership traits, was intelligent, acted of his own free will and was not under the domination of anyone at the time of the murder.

FACT:

That neither Barclay or Dougan were under the substantial domination of the other as they committed the dastardly murder - and each vyed to outdo the other in homicidal ferocity.

CONCLUSION:

There is no mitigating circumstance as to the defendant under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED

FACT:

The defendant Barclay had been through the criminal justice system and was a convicted felon. He well understood the criminality of his conduct.

FACT:

There was never any suggestion or claim of insanity or any showing, by any evidence - at trial or in response to the PSI - that Barclay did not appreciate the criminality of his acts or that he could not conform his conduct to the requirements of the law. The evidence showed that upon setting out on a homicidal course that there was ample opportunity for Barclay to withdraw from the plot, but he and the others calculatedly and premeditatedly stalked their victim and produced his death - knowing the full consequences thereof.

FACT:

There is no evidence or testimony in trial, in response to PSI or at any other place that

ever suggests that Barclay was incapable of appreciating the criminality of his acts or conforming his conduct to the requirements of the law.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to Barclay.

G. THE AGE OF DEFENDANT AT THE TIME OF THE CRIME

FACT:

The defendant Barclay was twenty-three years of age, had finished senior high school, had married in 1969, fathered five children and he and his wife were separated at the time of the crime. According to the PSI he had subsequently fathered another child by another woman, and had worked, not too successfully, at various jobs. He was a mature male, in good health, standing five feet ten inches tall and weighing one hundred and sixty pounds. He also had some expertise in karate. He was five years older and larger than his eighteen year old victim.

CONCLUSION:

There is no mitigating circumstance as to defendant under this paragraph.

SUMMARIZATION OF AGGRAVATING ELEMENTS

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE HAS BEEN CONVICTED

FACT:

The defendant, Barclay, was not under sentence of imprisonment at the time of the commission of this murder. His rap sheet shows seven prior arrests and he had previously been convicted of a felony and had been on felony probation.

CONCLUSION:

Although not imprisoned, the criminal record of Barclay is an aggravating circumstance.

B. WHETHER THE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON

FACT:

The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into.

CONCLUSION:

This is more of an aggravating than a negative circumstance.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS

FACT:

The testimony and evidence showed that Barclay and the other defendants drove around various areas of the City looking for a victim or victims - thus potentially exposing numbers of people to a great risk of death. On at least two occasions the defendants parked their car - and exited areas where they had chosen potential victims - but were thwarted by the circumstances that fortuitously existed. Five persons were exposed to their planned murder and it was not out of concern for the lives of many persons that only a single victim was chosen - but rather out of concern for their own detection and capture.

The tapes made by Barclay and Dougan - which were sent to the media - were a declaration of war by the murderers against white people. It was a call for others to join in their homicidal schemes and it was a call for revolution and racial war between a black and white population - if confined to Jacksonville - of over one-half million persons.

Barclay and the other defendants did, in fact, knowingly create a great risk of death to many persons. The extent of that danger - had they been successful to any degree - boggles the mind by contemplating the monstrous consequences.

CONCLUSION:

There is an aggravating circumstance here because not only did Barclay and the other defendants murder Stephen Anthony Orlando - they also created a great risk of death to others, before, during and after the murder.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB

FACT:

The only element of this aggravating circumstance applicable to this case is the crime of kidnapping which - as applicable to this case - is defined in F.S. 787.01 as:

> "(1)(a) Forcibly, secretly, or by threat confining, abducting, or imprisoning another person against his will and without lawful authority, with intent to:
>
> 2. Commit or facilitate commission of any felony.
>
> 3. Inflict bodily harm upon or terrorize the victim or another person."

The facts of this murder were that the defendants picked up the hitchhiking victim with intent to murder him. They refused to take him to the place requested and by force and/or threats kept him in their car until they found an appropriate place for the murder. The victim was then removed from the car - brutalized and murdered. Each essential element of kidnapping was certainly present in this case.

CONCLUSION:

There is an aggravating circumstance as to the defendant under this paragraph.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY

CONCLUSION:

This paragraph does not seem to apply to the present case.

F. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN

CONCLUSION:

This paragraph does not seem to apply to the present case.

G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS

FACT:

More than any other factor, this paragraph together with the racial hatred murder - seems to have been one of the primary motives for the murder. The stalking of an innocent victim and slaughtering him only because he was of a different race than his murderers and then using a knife to stick a note on his body - which read:

> "Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. We must destroy our enemy therefore, you must die. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free."

This was a call to revolution. The tapes made by Barclay and the others and sent to the media was a further and more violent call for a race war and for revolution. Typical excerpts of the tapes are as follows on the next two pages.

"To the oppressive state: This is directed to enemy Mary Ann Mallery, Lt. J. A. Orlando (the victim's mother and father) and especially pig Garrett. Stephen A. Orlando was not murdered; he was executed and made to pay for the political crimes that have been perpetrated upon black people. No longer will your crimes go unpunished. A revolution has begun and you are the enemy.

"You white racist Americans, because your nature is that of a white devil you can never do right. So the black man's freedom depends upon your defeat or your death. The revolution will end only when you are dead or when black people are free.

"Mary Ann Mallery, you should be proud that you son, Stephen, was the first to die for our black cause. Many more will follow him until we are free. I know that pig Garrett did not want to publicize the contents of the execution note found on Stephen's dead body, but he knows that revolution is very serious. He should be alarmed for now he knows that he and people like him will have to pay for their crimes. Black people have given no support in what we are doing because you will not listen to nothing [sic] else but that which comes from the barrel of a gun.

"The reason Stephen was only shot twice in the head was because the gun jammed. He was stabbed in the back, chest and the stomach to symbolize the 400 years of hangings, castrations, brutalities and rapings of my black people. He begged, oh yes, he begged for mercy as did my people when you murdered them, and we gave him no mercy. That's right, no mercy, for every time I pulled trigger, every time I saw the knife go inside his body, satisfaction came unto me because I knew, I knew, that the people who died because of him, because of his ancestors and because of you were now being repaid.

"Remember, white racist America, this could happen to you also as long as black people are oppressed. We as black people are no longer begging anymore. Even we will take what is ours, what is rightly ours. We created it so we should have it. The Black Liberation Army will destroy you. They will destroy everything that stands in the way of the black man's freedom. To all my black people, black warriors have emerged on the scene to show you the way to freedom and the destruction of our enemy, the white man. White people, prepare yourself to die. I am your Black Liberation Army."

FACT:

The messages and actions of Barclay and the other defendants were, in all ways, a call to disrupt and hinder the lawful exercise of governmental functions and the enforcement of the laws. It was a call to destroy our government and its laws by violent racial revolution.

CONCLUSION:

This is an aggravating circumstance.

H. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

FACT:

The defendant Barclay, together with the other defendants, premeditatedly and deliberately stalked their victim and brutally murdered him.

The victim's only crime was that he was of a different racial group than his murderers. He in no way offended them - except by being white - nor did he even know them before that fatal evening.

The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head at close range.

In addition to an unprovoked, premeditated murder - it was a declaration of war against a racial group - with the promise of more violence, death and revolution to come.

Such acts of Barclay and the other defendants were of the basest, most callous homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrator.

CONCLUSION:

That the murder of which the defendant Barclay was convicted was especially heinous, atrocious and cruel.

COMMENT

That the defendant Barclay did not present any matters in his responses to the PSI which mitigated the heinous, atrocious and cruel nature of this crime.

That the passage of approximately five years from the date of this murder until the date of this sentence - has not diminished the nature of this crime. Stephen Anthony Orlando was murdered and the facts of the crime and the call for bloodshed and revolution are the same.

CONCLUSION OF THE COURT

THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH AS TO THE DEFENDANT ELWOOD CLARK BARCLAY.

AUTHORITY FOR SENTENCE

That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life imprisonment. This is an awesome burden to be placed upon the Judge - but in the landmark Florida case of State v. Dixon, 283 So.2d 1, the Florida Supreme Court said that when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory", then it meets the test of Furman v. Georgia, 408 U.S. 238.

COMMENTS OF JUDGE

My twenty-eight years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a prosecutor for eight and one-half years and a Criminal Court and Circuit Court Judge - Felony Division - for almost ten years. During these twenty-eight years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience, I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.

To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and when justified by a Jury verdict of guilty - then to terminate and remove permanently from society those who would choose to initiate this diabolical course.

HAD THE DEFENDANT BEEN EXPOSED TO THE CARNAGE OF THE BATTLEFIELDS AND THE HORRORS OF THE CONCENTRATION CAMPS INSTEAD OF MOVIES, TELEVISION PROGRAMS AND REVOLUTIONARY TRACTS GLORIFYING VIOLENCE AND RACIAL STRIFE - THEN PERHAPS HIS THOUGHTS AND ACTIONS WOULD HAVE TAKEN A LESS VIOLENT COURSE.

Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy - but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits further right to life - for certainly his life is no more sacred than that of the innocent eighteen year old victim, Stephen Anthony Orlando.

SENTENCE

Having adjudged ELWOOD CLARK BARCLAY guilty of Murder in the First Degree, I hereby sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set.

That on such day, as set, you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today to take an appeal from the sentence which I have just imposed upon you and I hereby appoint Bartley E. Vickers to represent you on such appeal.

May God have mercy upon your soul.

DONE AND ORDERED AND SENTENCED in Open Court at the Duval County Courthouse, Jacksonville, Florida, on this 18th day of April, 1980.

R. HUDSON OLLIFF, CIRCUIT JUDGE

Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 81-6908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELWOOD C. BARCLAY,

Petitioner,

—against—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOINT APPENDIX

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IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 74-4139 DIVISION: S

SENTENCES OF ELWOOD CLARK BARCLAY AND JACOB JOHN DOUGAN, JR.

I N D E X

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2. OUTLINE OF ESSENTIAL FACTS - PAGES 4, THROUGH 9.

3. SUMMARIZATION OF MITIGATION ELEMENTS - PAGES 9 THROUGH 17.

4. SUMMARIZATION OF AGGRAVATING ELEMENTS - PAGES 17 THROUGH 27.

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7. COMMENTS OF JUDGE - PAGES 28, THROUGH 29. (see also pages 1, through 4.)

8. SENTENCE - PAGES 29, THROUGH 30.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 74-4139 DIVISION: S

STATE OF FLORIDA

S E N T E N C E

-vs-

JACOB JOHN DOUGAN, JR.,
ELWOOD CLARK BARCLAY,
DWYNE CRITTENDON, and
BRAD W. EVANS

S U M M A R Y

Two of the above named defendants, Jacob John Dougan, Jr., and Elwood Clark Barclay, have been convicted in this Court of Murder in the First Degree, by a Jury of twelve men and women of both the black and white race. They stand convicted of the murder of eighteen year old Stephen Anthony Orlando - and are now before this Court for sentence.

Their two co-defendants, Dwyne Crittendon and Brad W. Evans, were convicted of murder in the second degree and were each sentenced to terms of one hundred and ninety nine years in the State Prison.

The defendants Dougan and Crittendon are also charged with another First Degree Murder - which is yet to be tried.

COMMENTS OF JUDGE

These comments were made by me at the time of the sentence of Crittendon and Evans, but are even more appropriate to the defendants Dougan and Barclay.

The present case is one of the rarest types of crimes to come before this Court or any Court. The facts at trial proved that it was a PREMEDITATED - RACIAL - HATRED MURDER. The hapless victim was chosen at random, stalked and brutally murdered ONLY because he was defenseless

abd because he was of a DIFFERENT racial group than his murderers.

After the crime, tapes were made by the murderers wherein they described the killing and the agony of the victim. These boastful tapes were cruelly mailed to the Mother of the murdered boy and to local T.V. and Radio Stations - bragging of the murder and announcing that it was the start of a revolution and promised further violence. One part of the tape said "White people prepare yourself to die." It was a call for, and an attempt to start a racial war.

Such ravings could only be from a depraved homicidal mind.

Similar sentiments were violently uttered on another continent in our own recent history. During World War II, when I was about 19 years old, I was among some of the first American Combat Infantry Soldiers

to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly, the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like cord wood - to be buried or burned in the ovens.

Those people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were murdered because they were all guilty of the same crime - they were different from the people who murdered them. They were either of a different race, culture, religion or political belief. That was their only crime - they were different. Surely we must have learned some lasting lesson from that tragic holocaust.

The law does not require that we like each other - nor is it illegal to have

prejudices - but it is unlawful to do injury to another person because of that hate and prejudice.

This type of random, racial - hate murder, is almost impossible to believe. Animals hunt and kill for food and, in time of war, men kill in self defense those who would kill them. But to premeditatedly pick a victim at random, a person not even known to his murderers and who was chosen for death only because he was guilty of being of a different race - is heinous, atrocious, cruel and an unthinkable crime.

We do not have to like each other - but we must respect the rights of others and we must either live together - or surely we will die together.

Jacksonville and, indeed, the nation has made great progress in race relations and understanding over the last few years.

But you, who have committed this racial - hatred murder, have done more to disrupt those good relations and progress than any other one factor in recent time.

You have done a gross dis-service to both the black and white citizens of this City. You have given fuel to those who want to think the worst of the people of your race - and you have caused consternation and disgust amongst both blacks and whites who are most anxious to help us achieve a society of equality.

Until your arrest - terror stalked the streets of this City - and it was only due to the good will of both our black and white citizens that order prevailed and further violence and retaliatory acts were not committed.

Nothing good has, or ever will, come from the murder of Stephen Anthony Orlando, but the tragic slaughter of this eighteen

year old youth can be used to point to the monumental stupidity of murder as the result of racial hatred.

OUTLINE OF THE ESSENTIAL FACTS

The essential facts as brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the "BLACK LIBERATION ARMY" (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty-two caliber pistol and a knife with the intent to kill a "devil". The devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

That as they drove around the City of Jacksonville they made several stops and observed white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote a note - which was to be placed on the body of the victim ultimately chosen for death.

Eventually the five men headed for Jacksonville Beach where they picked up a hitch hiker, eighteen year old, Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife. Dougan then put his foot on Orlando's head and shot him twice - once in the cheek and once in the

ear - killing him instantly. Crittendon and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

> "Warning to the oppressive state. no longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people."

Early the following morning the dead body of Stephen Anthony Orlando was discovered - Police were called to the scene and the knife and note were preserved for evidence and photos were taken of the dead

body and surrounding area. An F.B.I. document and handwriting expert compared the death note with other handwriting of Dougan and testified that they were both written by the same person.

Subsequent to the murder the defendants Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the Mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all - as follows:

> "Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of

the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed..."

"If you want to know how to spell "Americans," just spell it with three Ks instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so the black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again.' Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods....'

"Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom...."

"You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and your National Guards and you spray black people with all that tear gas and you just take advantage of black people...."

"We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offsprings, those things, those stringy-haired things you call your kids...

You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain...."

"The reason Stephen was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes...."

"He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs

in the same church that practices the same religion that you forced on these people, my people.

"We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla."

All of the tapes ended, "Signed, Your Black Liberation Army."

William Hearn, one of the five persons present at the murder of Orlando, testified that he witnessed the murder and told of the participation of Barclay, Dougan, Evans and Crittendon - and he together with witnesses James Mattison, Edred Black and Otis Bess, Jr., stated that they were present when the boastful tapes were made and they identified the voices of Dougan

and Barclay when the tapes were played to the Jury.

In defense, Dougan denied the murder and the death note - but admitted that he made the tapes based on newspaper accounts he had read - and said that the purpose of the tapes was to dramatize the plight of black people. Barclay admitted making the tapes for the same political reasons - but denied any participation in the murder. Each defendant had alibis as to his whereabouts at the time of the murder, but the Jury found them all guilty of murder.

The Jury found both Barclay and Dougan guilty of murder in the first degree and in its advisory sentence the Jury recommended death for Dougan by a vote of ten to two. In its advisory sentence the Jury recommended life imprisonment for Barclay by the barest majority of seven to five. The

Court does not feel bound by the advisory sentence as to the defendant Barclay because of the closeness of the vote and because of his major participation in the murder.

The Jury having found both Barclay and Dougan guilty of murder in the first degree and having rendered its advisory sentence, and the Court has heard and denied the Motions for New Trial and other Motions of defendants. I do hereby adjudge each of the defendants, Barclay and Dougan, guilty of murder in the first degree.

Before imposing the sentences for Murder in the First Degree, The Court has closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in the Florida Statutes and which were guide lines for the Jury in considering its advisory sentences.

The Court has summarized the facts as brought out in the trial and in the presentence reports and has applied them to each element of aggravation and mitigation where applicable. Because the acts of Barclay and Dougan are so entwined the Court has considered them together - but makes distinctions as to each where the facts and circumstances so dictate. The elements of Aggravation and Mitigation have been summarized below in reverse order.

SUMMARIZATION OF MITIGATION ELEMENTS

A. WHETHER DEFENDANTS HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

The defendant, Barclay, has an extensive criminal record of seven prior arrests. It shows that he had previously been on probation for the

crime of uttering a forgery, and that subsequently that probation was revoked and he was sentenced to a term of six months County Jail. It also shows that he had previously been on five years probation for the crime of Breaking and Entering and Grand Larceny. There are also a number of misdemeanor crimes charged. (see PSI)

FACT:

The defendant, Dougan, has a record showing one traffic related offense and two convictions for contempt of Court. It also shows in his rap sheet that he has another murder charge pending which is yet to be tried.

CONCLUSION:

There is neither an aggravating or mitigating circumstance as to the defendant Dougan because the facts of the Contempt of Court are not known at this time. The additional murder charge cannot be considered because he has not yet been tried on that charge. There is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record showing at least one prior felony conviction and one prior felony probation.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANTS WERE UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

FACT:

That neither Barclay or [sic] Dougan had any claim or defense of insanity or emotional instability. Each had an alibi for the time of the crime and stated they were innocent of the charge. Nor is there any evidence from the PSI that either defendant suffered emotional disturbances in the past or at the present.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to either defendant, because there is no evidence of extreme mental or emotional disturbance at the time of the murder or at the present.

C. **WHETHER THE VICTIM WAS A PARTICIPANT IN THE CONDUCT OF THE DEFENDANTS OR CONSENTED TO THE ACT.**

FACT:

The defendants, Barclay and Dougan, together with the others mentioned had already decided upon a course of homicide and were looking for a victim when they spotted Stephen Anthony Orlando and offered him a ride. There was testimony that the victim urged they take him to a house - so that he could get out and away from his abductors. Instead, he was taken to a trash dump and there the unarmed youth was ordered out of the car - knocked to the ground - stabbed repeatedly by Barclay and shot by Dougan.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendants, Dougan and Barclay, intended to kill Orlando at the time he got into the car. Orlando could not, and would not, in any way, consent to his own murder, and in fact, he begged for mercy - all in vain.

D. WHETHER DEFENDANTS WERE ACCOMPLICES IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANTS' PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The participation by Crittendon, Evans and Hearn was lesser in degree and they have been adjudged guilty of murder in the second degree.

FACT:

Both Barclay and Dougan were the major and primary participants in the murder. The evidence shows that Barclay was the first to demonstrate homicidal intent by throwing the victim to the ground and repeatedly stabbing him with a knife - as Orlando pleaded for his life. Then Dougan rendered the Coup De Grace by shooting the victim twice in the head.

A close attention to Barclay's boastful remarks on the tapes will lead any listener to conclude that he was a major participant and proud of that participation. Had Dougan been the only major participant - then perhaps Orlando, who was

struggling for his life, might have been able to escape. But Barclay and Dougan acting in concert over-powered, stabbed and shot their common prey.

FACT:

Dougan, as shown by the evidence, was the originator and leading force in the idea and he wrote the note and shot the victim after Barclay repeatedly stabbed him - but it was the two of them who were the primary culprits. The lesser participants being Crittendon, Evans and Hearn - which fact was recognized by the Jury finding Barclay and Dougan guilty of Murder in the First Degree and the others guilty of Second Degree Murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to either Barclay or Dougan - who were acting in concert in the murder and both were the major participants.

E.

WHETHER EITHER DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

Never, at any time, in any way, was it shown that any defendant acted under duress of any kind. The defendant Barclay, had a record of seven arrests - showing a felony conviction, a misdemeanor conviction and felony probation. He is, or was, a married man, 23 years of age with several children. He had

gone through senior high school. It was not contended by Barclay that he was under the substantial domination of Dougan or any other person. Had such been apparent, then perhaps the Jury would have found him guilty of the lesser crime of murder in the second degree.

FACT:

It is apparent from the evidence at trial and the demeanor of the defendants that Dougan was a personality of some degree - but it was likewise apparent that Barclay had a strong personality and was eloquent and persuasive in his own right as is evidenced by the repulsive but dramatic tape recording he made boasting of the murder.

FACT:

Dougan, as the evidence showed, was certainly not under the dominance of any other person, but it is evident from all that occured at the murder scene, that both Barclay and Dougan committed a foul and dastardly murder with each vying to outdo the other in homicidal ferocity.

CONCLUSION:

There is no mitigating circumstance as to either defendant under this paragraph.

F. WHETHER THE CAPACITY OF EITHER DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

There was never any suggestion or claim of insanity or any showing, by any evidence, that Barclay and Dougan did not appreciate the criminality of their acts or that they could not conform their conduct to the requirements of the law. The evidence showed that upon setting out on a homicidal course that there was ample opportunity to withdraw from the plot, but they calculatedly and premeditatedly stalked their victim and produced his death - knowing the full consequences thereof.

There was also testimony that Dougan had previously been an Eagle Scout and "had been one of his best boys," said his former Scoutmaster.

FACT:

Their incapacity to appreciate the criminality of their acts or to conform to the law was not impaired. No incapacity was apparent except an emmense [sic] ego which led them to believe they would not be discovered and brought to tasks for their deed.

OBITER DICTUM:

If an inflated ego and a highly unrealistic and undeserved belief in their cleverness and infallibility would make defendants not appreciate the criminality of their conduct or substantially impair their ability to adhere to the right - then any person with a similar state of mind would be given carte blanche to decimate that portion of the popula-

tion against whom he had a real or imagined grievance.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to either defendant.

G. THE AGE OF DEFENDANTS AT THE TIME OF THE CRIME.

FACT:

The defendant Barclay was 23 years of age, had finished Senior High School, had married in 1969, fathered five children and he and his wife were separated at the time of the crime. According to the PSI he had subsequently fathered another child by another woman and had

worked, not too successfully, at various jobs. He was a mature male, in good health, standing five feet ten inches tall and weighing one hundred and sixty pounds. He also had some expertise in karate. He was five years older and larger than his eighteen year old victim.

FACT:

The defendant Dougan was 27 years of age, had completed Senior High School and had served in the military. He held various jobs - including that of a karate instructor. He had been married, fathered two children, and was divorced. He was in good health, stood five feet ten inches tall weighing one hundred and forty five pounds. He was nine

years older and larger than his eighteen year old victim.

CONCLUSION:

There is no mitigating circumstance, as to either defendant, under this paragraph.

THE COURT NOW SUMMARIZES THE FACTS BROUGHT OUT IN TRIAL AND APPLIES THEM TO THE ELEMENTS OF AGGRAVATION WHICH WERE CONSIDERED BY THE JURY IN ARRIVING AT THEIR ADVISORY SENTENCE.

SUMMARIZATION OF AGGRAVATING ELEMENTS

A. WHETHER THE DEFENDANTS WERE UNDER SENTENCE OF IMPRISONMENT WHEN THEY COMMITTED THE MURDER OF WHICH THEY HAVE BEEN CONVICTED.

FACT:

The defendant, Barclay, was not under sentence of imprisonment at the time of the commission of this murder. His rap sheet shows seven prior arrests and he had previously been convicted of a felony and had been on felony probation. As between Barclay and Dougan - the Defendant, Barclay had, by far, the worst criminal record. This, however, might well be outweighed by the fact that Dougan now has pending against him another charge of murder in the first degree.

FACT:

Dougan has two prior convictions of contempt of Court. The second murder charge against him cannot be

considered because it is yet to be tried.

CONCLUSION:

Although not imprisoned, the criminal record of Barclay is an aggravating circumstance. The two criminal contempt convictions of the defendant, Dougan are aggravating circumstances without even considering the murder charge now pending against him.

B. WHETHER EITHER DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

FACT:

The defendant, Barclay, was previously convicted of breaking and

entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into or if apprehended by police at or in pursuit after the act.

FACT:

Whether Dougan's prior convictions for Contempt of Court was for disobedience of a Court Order - or for some act of violent disobedience or contempt in or out of Court is not known at this time.

CONCLUSION:

As to both defendants there are more aggravating than mitigating circumstances.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH THEY HAVE BEEN CONVICTED, THE DEFENDANTS KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

The testimony and evidence showed that all five defendants drove around various areas of the City looking for a victim or victims, thus potentially exposing numbers of people to a great risk of death. On at least two occasions the defendants parked their car - and cased areas where they had chosen potential victims - but were thwarted by the circumstances that fortuitiously [sic] existed. Thus five persons were saved from their fatal plan. It was not out of concern for the

lives of many persons that only a single victim was chosen, but rather out of concern for their own detection and capture.

The note left on the dead body of their victim and the tapes sent to the media were a declaration of war by the murderers against white people. It was a call for others to join in their homicidal schemes and it was a call for revolution and racial war. The messages said "white people prepare yourself to die." If they only meant the white people of Jacksonville - that would mean roughly seventy percent of more than half a million people.

Both defendants, did in fact, knowingly create a great risk of

death to many persons - the extent of that danger had they been successful to any degree boggles the mind - by contemplating the monstrous consequences.

CONCLUSION:

There is an aggravating circumstance here because not only did they murder Stephen Anthony Orlando - they created a great risk of death to others, before, during and after the murder.

D. WHETHER THE MURDER OF WHICH DEFENDANTS WERE CONVICTED WAS COMMITTED WHILE THEY WERE ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

After the hitch-hiking victim was picked up by the defendants they refused to take him to a place which he requested. Instead they would not let him out of the car and drove him to a trash dump where he was murdered. The only element of this paragraph which has any meaning to the present case is the element

of kidnapping. Although defendants were only charged with murder - all of the elements of kidnapping or false imprisonment were certainly present in this case.

CONCLUSION:

There is an aggravating circumstance as to both defendants under this paragraph.

E. WHETHER THE MURDER OF WHICH THE DEFENDANTS HAVE BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

CONCLUSION:

This paragraph does not seem to apply to the present case.

F. WHETHER THE MURDER OF WHICH DEFENDANTS HAVE BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.

CONCLUSION:

This paragraph does not seem to apply to the present case.

G. WHETHER THE MURDER OF WHICH THE DEFENDANTS HAVE BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS.

FACT:

More than any other factor, this paragraph together with the racial hatred murder - seems to have been one of the primary motives for the murder. The stalking of an innocent victim and slaughtering him only

because he was of a different race than his murderers and then using a knife to stick a note to his body - which read:

> "Warning to the oppressive state, No longer will your atrocities and brutalizing of black people be unpunished. We must destory our enemy therefore you must die. The black man is no longer asleep. The revolution has begun and the opppressed will be victorious. The revolution will end when we are free."

This was a call to revolution. The tapes made by each defendant and sent to the media was a further and more violent call for a race war and for revolution. Typical excerpts of the tapes are as follows on the next two pages.

> "To the oppressive state: This is directed to enemy Mary Ann Mallory, Lt. E. A. Orlando (the victim's mother and

father) and especially pig Garrett. Stephen A. Orlando was not murdered; he was executed and made to pay for the political crimes that have been perpetrated upon black people. No longer will your crimes go unpunished. A revolution has begun and you are the enemy.

"You white racist Americans, because your nature is that of a white devil, you can never do right. So the black man's freedom depends upon your defeat or your death. The revolution will end only when your are dead or when black people are free.

"Mary Ann Mallory, you should be proud that your son, Stephen, was the first to die for our black cause. Many more will follow him until we are free. I know that pig Garrett did not want to publicize the contents of the execution note found on Stephen's dead body, but he knows that revolution is very serious. He should be alarmed for now he knows that he and people like him will have to pay for their crimes. Black people have given us support in what we are doing because you will

not listen to nothing (sic) else but that which comes from the barrel of a gun.

"The reason Stephen was only shot twice in the head was because the gun jammed. He was stabbed in the back, chest and the stomach to symbolize the 400 years of hangings, castrations, brutalities and rapings of my black people. He begged, oh yes, he begged for mercy as did my people when you murdered them, and we gave him no mercy, that's right, no mercy, for every time I pulled the trigger, every time I saw the knife go inside his body, satisfaction came unto me because I knew, I knew, that the people who died because of him, because of his ancestors and because of you were now being repaid.

"Remember, white racist America, this could happen to you also as long as black people are oppressed. We as black people are no longer begging anymore. Even we will take what is ours, what is rightly ours. We created it so we should have it. The Black Liberation Army will destroy you. They will destroy everything that stands in the

> way of the black man's freedom. To all my black people, black warriors have emerged on the scene to show you to the way to freedom and the destruction of our enemy, the white man. White people, prepare yourself to die. From your Black Liberation Army."

FACT:

The messages and actions of the defendants were, in all ways, a call to disrupt and hinder the lawful exercise of governmental functions and the enforcement of the laws. It was a call to destroy our government and its laws by violent racial revolution.

CONCLUSION:

This is an aggravating circumstance as to both defendants.

E. WHETHER THE MURDER OF WHICH DEFENDANT HAVE BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The defendants, Barclay and Dougan, together with the others premeditatedly and deliberately stalked their victim and brutally murdered him.

The victim's only crime was that he was of a different racial group than his murderers. That he in no way offended them nor did he even know them before that fatal evening.

The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy.

Then Dougan shot him twice in the head at close range.

In addition to an unprovoked, premeditated murder - it was a declaration of war against a racial group - with the promise of more violence, death and revolution to come.

Such acts of the defendants were of the basest, most callous, homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrators.

CONCLUSION:

That the murder of which the defendants, Barclay and Dougan have been convicted, was especially heinous, atrocious and cruel.

CONCLUSION OF THE COURT

THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH AS TO BOTH DEFENDANTS, BARCLAY AND DOUGAN.

AUTHORITY FOR SENTENCE

That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life imprisonment. This is an awesome burden to be placed upon the Judge - but in the landmark Florida case of State v. Dixon, 283 So. 2d 1, the Florida Supreme Court said that when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory, then it meets the

test of Furman v. Georgia, 408 U.S. 238."

COMMENTS OF JUDGE

My 23 years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a Prosecutor for eight and one-half years and a Criminal Court and Circuit Court Judge - Felony Division - for almost four and one-half years. During these twenty three years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Soldiers, walked the battle fields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial extermination.

To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal process and when justified by a Jury verdict of guilty - then to terminate and remove permanently from society those who would choose to initiate this diabolical course.

HAD THE DEFENDANTS BEEN EXPOSED TO THE CARNAGE OF THE BATTLEFIELDS AND THE HORRORS OF THE CONCENTRATION CAMPS INSTEAD OF MOVIES, TELEVISION PROGRAMS AND REVOLUTIONARY TRACTS GLORIFYING VIOLENCE AND RACIAL STRIFE - THEN PERHAPS THEIR THOUGHTS AND ACTIONS WOULD HAVE TAKEN A LESS VIOLENT COURSE.

Having set forth my personal experiences above it is understandable that I am not easily shocked or moved by tragedy - but this present murder and call for racial war is especially shocking and meets ever [sic] definition of heinous, atrocious and cruel.

The perpetrators thereby forfeit further right to life - for certainly their lives are no more sacred than that of the innocent eightenn [sic] year old victim, Stephen Anthony Orlando.

S E N T E N C E

Having adjudged both Jacob John Dougan, Jr., and Elwood Clark Barclay, guilty of Murder in the First Degree, I hereby sentence both of you to death. I order that you both be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set.

That on such day, as set, you both be put to death by having electrical currents passed through your bodies in such amounts and frequency until you are both rendered dead.

I advise each of you that you have thirty days from today to take an appeal from the sentences which I have just imposed upon you and I hereby appoint the Public De-

fender's Office to represent you on such appeals.

May God have mercy upon your souls.

DONE, and ORDERED and SENTENCED in Open Court, at the Duval County Courthouse, Jacksonville, Florida, on this the 10th day of April, 1975.

/s/ Hudson Olliff
HUDSON CLLIFF

CIRCUIT JUDGE JUDGE - FELONY DIVISION - S

Elwood Clark BARCLAY and Jacob John Dougan, Jr., Appellants,

v.

STATE of Florida, Appellee.

No. 47260.

Supreme Court of Florida.

March 17, 1977.

Rehearing Denied April 7, 1977.

PER CURIAM.

We have for review on direct appeal from the Circuit Court of Duval County, judgments of guilty of murder in the first degree and sentences of death. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

Appellants were indicted for the first degree murder of Stephen Anthony Orlando, were found guilty by a jury who after advisory hearing recommended that the

death sentence be imposed as to Dougan and that life imprisonment be imposed as to Barclay,[1] were convicted and sentenced to death.

As evidenced by the sentencing order of the trial judge and supported by the record, the facts surrounding the slaying which the judge characterized as a random, racial hate murder are as follows:

> "The essential facts are brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the 'BLACK LIBERATION ARMY' (BLA), and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.
>
> "The testimony showed that on the evening of June 17, 1974, Dougan, Barclay, Crittendon, Evans and William Hearn set out in a car armed with a twenty two caliber pistol and a knife with the

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1. As to Barclay, the jury recommended life by a vote of seven to five.

intent to kill a 'devil'. The devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

"That as they drove around the City of Jacksonville they made several stops and observed white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote out a note--which was to be placed on the body of the victim ultimately chosen for death.

"Eventually the five men headed for Jacksonville Beach where they picked up a hitch hiker, eighteen year old, Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay repeatedly stabbed him with a knife. Dougan then put his foot on Orlando's head and shot him twice--once in the cheek and once in the ear--killing him instantly. Crittendon and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

"The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

"'Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.'

"Early the following morning the dead body of Stephen Anthony Orlando was discovered--police were called to the scene and the knife and note were preserved for evidence and photos were taken of the dead body and surrounding area. An F.B.I. document and handwriting expert compared the death note with other handwriting of Dougan and testified that they were both written by the same person.

"Subsequent to the murder the defendants Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the Mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all--as follows:

"'Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same

black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed . . . . .'

"'If you want to know how to spell 'Americans,' just spell it with three Ks instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so the black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again.' Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods . . . . .'

"'Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be en-

shrined when black people get their freedom . . . .'

"'You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with your tanks and National Guards and you spray black people with all that tear gas and you just take advantage of black people . . . . .'

"'We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offsprings, those things, those stringy-haired things you call your kids . . . You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain . . . . .'

"'The reason Stephen was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes . . . . .'

> "'He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people.
>
> "'We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla.'
>
> "All of the tapes ended, 'Signed, Your Black Liberation Army.'"

In detail, the Judge explained each of the aggravating and mitigating circumstances defined by statute and their application to the instant cause, and concluded that the death penalty was the appropriate punishment for appellants. As to the aggravating circumstance of heinousness or atrocity of the crime, the trial judge stated:

"The defendants, Barclay and Dougan, together with others premeditatedly and deliberately stalked their victim and brutally murdered him.

"The victim's only crime was that he was of a different racial group than his murderers. That he in no way offended them nor did he even know them before that fatal evening.

"The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head at close range.

"In addition to an unprovoked, premeditated murder--it was a declaration of war against a racial group--with the promise of more violence, death and revolution to come.

"Such acts of the defendants were of the basest, most callous, homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrators."

We have carefully considered each of the numerous points raised on appeal by appellants and find that none of them constitute reversible error.

[1] Sections 782.04 and 921.141, Florida

Statutes, are not unconstitutional nor were they unconstitutionally applied to appellants. State v. Dixon, 283 So.2d 1 (Fla. 1973), Alford v. State, 307 So.2d 433 (Fla. 1975), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, decided July 2, 1976.

Relative to appellants' argument that they were denied the right to be tried in the county where the crime occurred, we initially note the following excerpt from the record taken from the hearing on motion for new trial:

> "THE COURT: Insofar as the motions made by Mr. Jackson are concerned, the Court ruled upon the issue of the trial in Duval or St. Johns County, finding from the evidence that the incident occurred in Duval County, culminated in St. Johns County; read the specific statute with further instructions to the jury as to that particular aspect of the law. There has been no motion for change of venue insofar as St. Johns County was concerned or motion for change of venue to any other county. The evidence showed that the

> defendant got in the car, whether it was an abduction, kidnapping or whatever, it started in Duval County and then culminated in St. Johns County."

[2] The indictment charged that appellants "in the County of Duval and the County of St. Johns, State of Florida, unlawfully and from a premeditated design . . . did kill the said Stephen Anthony Orlando." The State cites the Court to Article I, Section 16, Florida Constitution, providing:

> "If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient."

and Section 910.05, Florida Statutes, providing:

> "If the acts constituting one offense are committed in two or more counties, the offender may be tried in any county in which any of the acts occurred."

Appellants were properly tried in Duval County, for the reasons well expressed by Judge Smith with respect to one of Dou-

gan's and Barclay's co-venturers. Crittendon v. State, 338 So.2d 1088, opinion filed October 11, 1976 (Fla. 1st DCA).

[3] Appellants contend that they were denied a fair and impartial trial because the prosecutor failed to reveal on direct examination complete details of a plea bargain agreement with a witness in exchange for his testimony. The State emphatically denies that the prosecution ever at any time deliberately and intentionally withheld any of witness Hearn's statement. No false testimony was given in this regard as is suggested by appellants. During the motion for new trial, appellants charged that the State willfully refused to disclose the full plea bargain agreement on direct examination. To this charge, State Attorney Austin expressly objected, as follows:

> "MR. AUSTIN: Your Honor, I'm--just a minute. I'm just going to make an objection that that's a bad faith argument; that this lawyer knows if Hearn had opened his mouth about the second murder it would have been a mistrial, and he knows it and he had a perfect right to cross examine on it. He didn't open the door because he knows it would prove that his man was guilty of two murders instead of one to the same jury, and I'll submit that it's a bad faith argument."

Although completely aware of the agreement, defense counsel never inquired of the subject State witness as to any bargain or deal or representations made to him by the State Attorney's office, nor did he on cross examination attempt to shake the credibility of this witness because of the plea bargain agreement mentioned on direct examination. Defense counsel, on cross examination, did not even mention the agreement that had been elicited on direct examination. As is clearly evidence by the record, without question, defense was fully aware of the full plea bargain agreement.

At the insistence of defense counsel, the deposition of Hearn was taken on January 31, 1975, at 10:20 a.m. in the Duval County Courthouse at which time Hearn testified fully to the details of the agreement thereby apprising the defense of the same.

Appellants raise several other points on appeal none of which we find to be meritorious so as to constitute reversible error.

We have listened carefully to oral argument, examined and considered the record in light of the assignments of error and briefs filed, and pursuant to Rule 6.16(b), Florida Appellate Rules, we have also reviewed the evidence to determine whether the interest of justice required a new trial, with the result that we find no reversible error is made to appear and

that the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded.

Having determined that no reversible error has been made to appear which would require a new trial, we must proceed to examine whether the death sentences imposed by the trial judge were appropriate under the peculiar circumstances of this case.

The jury in these cases distinguished between the appellants in presenting their recommendations for sentence, suggesting life imprisonment for Barclay and a death penalty for Dougan. It is particularly important, therefore, that we explain our decision to uphold the recommendation of the trial judge that both be executed.

[4] The judge before whom these cases were tried meticulously identified in writing each aggravating and mitigating cir-

cumstance listed in the death penalty statute, and he commented with specificity as to the relevance and weight to be accorded each. He noted as to Dougan that no mitigating circumstance pertained to his benefit, and that one of those factors actually suggested an aggravation rather than mitigation of sentence.[2] Dougan, who was age 27 at the time, had no significant history of prior criminal activity, was not (and did not claim to be) under a mental or emotional disturbance, was not (and did not claim to be) under duress or the dominance of another person and had (and did not deny having) full capacity both to appreciate the criminality of his conduct and to conform his conduct to law. The trial judge further found that Dougan's

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2. See Section 921.141(6), Fla.Stat. (1975).

victim was not a participant in the episode and had not consented to the act, but that Dougan was an accomplice with four others in this crime and had a dominant, as opposed to minor role, in its accomplishment. It was Dougan who conceived and planned the events that occurred. Each of these findings is well documented in the record of Dougan's trial.

As to aggravating circumstances relative to Dougan, the trial judge recited that four factors essentially had no relevance here.[3] Four others were present to some degree, named that Dougan's crime had created a great risk of death to

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3. Dougan was not under sentence of imprisonment, was not attempting to avoid arrest or escape custody, had not been previously convicted of a major felony, and had not acted for pecuniary gain.

many persons[4] had been committed while engaged in a kidnapping, had endeavored to disrupt governmental functions and law enforcement[5] and had been especially heinous, atrocious and cruel.[6] These findings are also well documented in the record before us. On balance, there is no doubt that the recommendation of the jury and the sentence of the trial judge are appropriate in his case.

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4. The trial judge noted five aborted attempts to select a victim from the streets of Jacksonville before Stephen Orlando was chosen, plus the taped threat made to white Jacksonville citizens that a race war had begun and none would be safe.

5. The basis for this finding was the judge's observation that the notion of a race war essentially threatened the foundations of American society.

6. Dougan's tapes explained how Stephen Orlando had begged for his life while being beaten and stabbed before Dougan "executed" him with two pistol shots in the head.

[5] As regards Barclay, who had received a life recommendation from the jury, virtually the same considerations apply with respect to consequences of the criminal episode. Different personal factors pertain, however. He was 23 rather than 27 years old, but had amassed a significant history of prior criminal activity. His participation, like Dougan's, was found by the trial judge not to be minor, as he was the first to assault the victim and then stab him repeatedly. The jury obviously weighed these differences somewhat differently than the trial judge.

When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail.[7]

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7. Tedder v. State, 322 So.2d 908 (Fla. 1975).

In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld.[8] Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being so nominal (a minor age difference but no suggestion of different maturities), the facts here do not warrant the dispensation of unequal justice. See Messer v. State, 330 So.2d 137 (Fla.1976); Slater v. State, 316 So.2d 539 (Fla.1975). "Equal Justice

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8. The trial judge here painstakingly and with reasoned judgment detailed the factors which caused his departure from the jury's recommendation. His thorough analysis is precisely the type we would expect from mature, deliberative judges in this state. It suggests why the Legislature put the trial judges of Florida in the middle of the sentencing process for capital cases.

Under Law" is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized. This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.

Accordingly, the judgments and sentences of the trial court are hereby affirmed.

It is so ordered.

OVERTON, C.J., and ADKINS, ENGLAND and ROBERTS (Retired), JJ., concur.

BOYD, J., concurs specially with an opinion.

HATCHETT, J., concurs in part and dissents in part with an opinion.

BOYD, Justice, concurring specially.

The jury found both Appellants guilty of murder in the first degree, but recommended death by electrocution for Appellant Dougan and a sentence of life imprisonment without eligibility for parole during the first twenty-five years for Appellant Barclay.

A careful review of the entire record convinces me the jury was correct in recommending a higher degree of punishment for Appellant Dougan than for Appellant Barclay. Appellant Dougan was the architect of this atrocity, planned the crime and lead his karate students on the night of the murder, directed the course of the auto trip of the defendants and selected the victim to be killed. Appellant Barclay was

a prinicipal and is guilty of murder, but he was a follower who did exactly what he was tcld to do by Appellant Dougan and I feel that he should be granted a life sentence rather than death. Dougan fully deserves electrocution.

HATCHETT, Justice, concurring in part and dissenting in part.

The murder in this case was heinous, atrocious, cruel, and indeed, senseless. Section 921.141, Florida Statutes (1975), "intended as it was to meet the constitutional infirmity of capital sentencing procedures explored in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), is designed to limit the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible." Provence v. State, 337 So.2d 783 (Fla. 1976). In a capital case a judicial

officer must evaluate the conduct of the defendant by weighing specifically enumerated aggravating and mitigating circumstances, taking into consideration prior judicial treatment of similar situations. The aggravating circumstances are limited to those listed in the statute.

The record in this case shows that the trial judge went beyond the statute and considered additional factors outside the record, including his own personal experiences, thus upsetting the balance mandated by the statute. We cannot properly perform our duty of review in capital cases and ensure uniform imposition of the death penalty if trial judges are allowed to supplement the list of factors found by the legislature to be determinative.

For this reason I would affirm the conviction and remand the case to the trial

judge for the entry of sentences in accordance with Section 921.141, Florida Statutes, under the authority of Miller v. State, 332 So.2d 65 (Fla.1976), and Messer v. State, 330 So.2d 137 (Fla. 1976).

Elwood Clark BARCLAY and Jacob John Dougan, Jr., Appellants,

v.

STATE of Florida, Appellee.

No. 47260.

Supreme Court of Florida.

September 7, 1978.

Certiorari Denied October 10, 1978.

See 99 S.Ct. 249.

ORDER FOR GARDNER RELIEF

PER CURIAM.

The judge who sentenced Elwood Barclay and Jacob Dougan to death for the murder of Anthony Orlando [sic] has responded to the order[1] providing for a uniform means of determining Gardner[2] relief. In his

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1. The order was issued May 6, 1977.

2. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977).

response he states that the sentences of death were not imposed on appellants based on any information prior to sentencing, the defense was provided copies of the presentence investigation reports prepared in the case by the Probation and Parole Commission. It does not appear clearly from the response or the record, however, precisely when the reports were released to the defense and whether it had a meaningful opportunity to be heard on any of the matter in either report.

To assure that the sentening procedure in this case satisfied the constitutional command of the Due Process Clause,[3] the death sentences are vacated and the cause is remanded to the trial court. The

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3. 14th Amendment, U.S. Constitution. See Gardner, above.

court is directed to provide a hearing at which the defense has the opportunity to rebut any of the information contained in the presentence investigation reports, whether in the confidential portion of the report or any other part. This direction, of course, requires that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal. Following the hearing the court is to impose sentences. If death is imposed as to either appellant there will be available in this Court review, limited to matters related to compliance with this order.

Accordingly, the death sentences are vacated and the case is remanded to the Circuit Court, in and for Duval County, with directions to conduct the proceeding outlined in this order.

It is so ordered.

ENGLAND, C.J., and BOYD, OVERTON and HATCHETT, JJ., concur.

ADKINS, J., dissents.

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 74-4139 DIVISION S

STATE OF FLORIDA

vs.

ELWOOD CLARK BARCLAY

SENTENCE OF ELWOOD CLARK BARCLAY

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SUMMARY OF PROCEEDINGS

That because there has been a lapse of approximately five years since I originally imposed sentence upon this defendant - it may be well to summarize the facts from indictment to the date hereof - for the benefit of review by the Florida Supreme Court.

1. On September 26, 1974, the defendants, ELWOOD CLARK BARCLAY, JACOB JOHN DOUGAN, DWYNE CRITTENDON AND BRAD W. EVANS, were indicted for murder in the first degree, as follows:

"IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR DUVAL COUNTY, SPRING TERM, ONE THOUSAND NINE HUNDRED AND SEVENTY-FOUR

STATE OF FLORIDA,

vs.

INDICTMENT FOR MURDER IN THE FIRST DEGREE

JACOB JOHN DOUGAN,Jr., ELWOOD CLARK BARCLAY, DWYNE CRITTENDON and BRAD W. EVANS

74-4139

IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that JACOB JOHN DOUGAN, JR., ELWOOD CLARK BARCLAY, DWYNE CRITTENDON and BRAD W. EVANS, on the 17th day of June, One Thousand Nine Hundred and Seventy-Four, in the County of Duval and the County of St. Johns, State of Florida, unlawfully and from a premeditated design to effect the death of Steven Anthony Orlando, did kill the said Steven Anthony Orlando, by shooting him to death with a pistol,contrary to the provision of Section 782.04, Florida Statutes."

2. On March 5, 1975, the defendants, Barclay, Dougan, Crittendon and Evans were convicted by Jury, as follows:

Barclay	- guilty of murder in the first degree
Dougan	- guilty of murder in the first degree
Crittendon	- guilty of murder in the second degree
Evans	- guilty of murder in the second degree

3. The jury - in its advisory sentence - recommended life imprisonment for Barclay by a vote of seven to five.
4. The jury - in its advisory sentence - recommended death for defendant Dougan by a vote of ten to two.
5. That the defendants Crittendon and Evans were sentenced by this Court to one hundred and ninety-nine years in the Florida State Prison in case 74-4139. The defendants, Crittendon and Evans, also pleaded guilty in case 74-4140 and were sentenced by this Court for that case also. That subsequently the conviction and sentence of Crittendon was affirmed. (See 388 So.2d 1088.) Evans did not pursue appeal.
6. On April 10, 1975, this Court sentenced both Barclay and Dougan to death.

7. On March 17, 1977, the Florida Supreme Court affirmed the conviction and sentence of both Barclay and Dougan. (See 343 So.2d 1266.)

8. On September 7, 1978, the Florida Supreme Court vacated the death sentences and ordered this Court to hold a hearing (as provided in Gardner v. Florida, 430 U.S. 349) at which the defendants would have an opportunity to rebut any information contained in the presentence investigation report - including any confidential or other parts thereof. (See 362 So.2d 657.)

9. On October 10, 1978, the United States Supreme Court denied certiorari to defendants Barclay and Dougan. (See 99 Supreme Court Reporter 249.)

10. That after the case was remanded to this

Judge in September of 1978, Mr. Ernest Jackson, attorney for both defendants, Barclay and Dougan, was granted a number of continuances due to his terminal illness - and eventually he withdrew from representation of defendants.

11. This Court then appointed private attorney Mr. Ken Vickers to represent Barclay and Mr. Randolph Fallin to represent Dougan. That both Mr. Vickers and Mr. Fallin are skilled attorneys with wide experience in capital cases. That several continuances were granted defendants while Mr. Fallin and Mr. Vickers represented them.

12. That eventually the defendant Dougan dismissed his Court appointed attorney, Randolph Fallin, and retained the services of Joseph Nursey of

the Team Defense Project, Inc., of Atlanta, Georgia. That such late entry of Mr. Nursey caused additional delay as to both defendants.

13. Subsequently both the defendants, Barclay and Dougan, filed motions to sever their cases one from the other. Such motions were granted and each responded to the presentence investigation report in separate proceedings on different dates. Subsequently the defendant Dougan was resentenced and this Court now sentences defendant Barclay.

SENTENCE TECHNIQUE

In the sentence of April 10, 1975, this Court sentenced both the defendants, Barclay and Dougan, in one written sentence.

During the Gardner relief proceedings, both defendants made motion for - and were granted - a severance so that their responses to PSI and sentences would be separate and apart from one another.

That, accordingly, this Court has sentenced each separately. However, because both were involved in and convicted of the same crime and their participation was so entwined - one with the other - that a thorough and complete sentence could not be imposed on either without periodic reference to the other.

COMMENTS OF JUDGE

This present case is one of the rarest types of crimes to come before this Court or any Court. The facts at trial proved that it was a PREMEDITATED - RACIAL - HATRED MURDER. The hapless victim was chosen at random, stalked and brutally murdered ONLY because he was defenseless and because he was of a DIFFERENT racial group than his murderers.

After the crime, tapes were made by the murderers wherein they described the killing and the agony of the victim. These boastful tapes were cruelly mailed to the mother of the murdered boy and to local T.V. and radio stations - bragging of the murder and announcing that it was the start of a revolution and promised further violence. One part of the tapes said

"White people prepare yourself to die." It was a call for, and an attempt to start a racial war.

Such ravings could only be from a depraved homicidal mind.

Similar sentiments were violently uttered on another continent in our own recent history. During World War II, I was among some of the first American Combat Parachute Infantry Soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly, the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like cord wood - to be buried or burned in the ovens.

Those people had been murdered in various

ways, by starvation, torture, gassing or they were shot. They were murdered because they were all guilty of the same crime - they were different from those people who murdered them. They were either of a different race, culture, religion or political belief. That was their only crime - they were different. Surely we must have learned some lasting lesson from that tragic holocaust.

The law does not require that we like each other - nor is it illegal to have prejudices - but it is unlawful to do injury to another person because of that hate and prejudice.

This type of random, racial - hate murder, is almost impossible to believe. Animals hunt and kill for food and, in time of war, men kill in self defense those who would

kill them. But, to premeditatedly pick a victim at random - a person not even known to his murderers - and who was chosen for death only because he was guilty of being of a different race - is heinous, atrocious, cruel and an unthinkable crime. The crime itself was horrible, but the attempt to incite racial war and a mass bloodletting - compounded the heinous quality of the murder.

We do not have to like each other - but we must respect the rights of others and we must either live together - or surely we will die together.

Jacksonville and, indeed, the nation has made great progress in race relations and understanding over the last few years. But you, who have committed this racial - hatred murder, have done more to disrupt

those good relations and progress than any other one factor in recent time.

You have done a gross disservice to both the black and white citizens of this City. You have given fuel to those who want to think the worst of the people of your race - and you have caused consternation and disgust amongst both blacks and whites of good will who are most anxious to help us achieve a society of equality.

Until your arrest - terror stalked the streets of this City - and it was only due to the good will of both our black and white citizens that order prevailed and further violence and retaliatory acts were not committed.

Nothing good has, or ever will, come from the murder of Stephen Anthony Orlando,

but the tragic slaughter of this eighteen year old youth can be used as an example of the monumental stupidity of racial - hatred murder.

OUTLINE OF THE ESSENTIAL FACTS

The essential facts as brought out in the trial and by the evidence were that the four defendants were part of a group that termed itself the "BLACK LIBERATION ARMY" (BLA) and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war.

The testimony shows that on the evening of June 17, 1974, Barclay, Dougan, Crittendon, Evans and Hearn set out in a car armed with a twenty-two caliber pistol and a knife with the intent to kill a "devil" - the devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them.

That as they drove around the City of Jacksonville they made several stops and

observed a number of white persons as possible victims, but decided that the circumstances were not advantageous and that they might be observed or thwarted in their evil purpose by possible witnesses. At one stop, Dougan wrote a note - which was to be placed on the body of the victim ultimately chosen for death.

Eventually the five men headed for Jacksonville Beach where they picked up a hitchhiker, eighteen year old Stephen Anthony Orlando. Against his will and over his protest they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay struck the first homicidal blow by repeatedly stabbing him with a knife. Dougan then put his foot on Orlando's head and shot him twice - once in the cheek and once in the ear. Crittendon

and Evans played a lesser degree in the murder and were thus convicted of murder in the second degree.

The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note, which Dougan had previously written, was stuck to Orlando's body by the knife of the murderers. The note read:

> "Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people."

Early the following morning the dead body of Stephen Anthony Orlando was discovered. Police were called to the scene and the knife and note were preserved for evidence and photos were taken of the dead body and

surrounding area.

Subsequent to the murder - the defendants Barclay and Dougan, by their own admission, and supported by the testimony of state's witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the Mother of Stephen Anthony Orlando and to radio and television stations. All of the tapes contained much the same in content and intent. The following two pages are excerpts of several tapes which were typical of all - as follows:

> "Stephen A. Orlando was not murdered, by no means. He was given a fair trial, the same type of fair trial that you gave black people, those same black people who occupy 25 per cent of the American population and 75 per cent of the American prison population. He was tried and found guilty and was executed..."

"If you want to know how to spell 'Americans,' just spell it with three Ks instead of one C, you know, like in Ku Klux Klan. You know white people, you can't do right; your nature is evil. But you gonna pay anyway so the black man's freedom must be gotten no matter what it takes. We can't depend on you for our freedom. We tried that once. You freed us with good ole Abe. He gave us the Emancipation Proclamation. That was the first time we were free. Then we dreamed a little longer, suffered a whole lot more, until you decided 'I'm gonna free those niggers again.' Then you gave us the Civil Rights Bill. How many times do you have to free a people before they are free? You know, like, once you freed us, twice you freed us. The third time you might free us for good, just wipe us out like you're trying to do our race as it is, pushing genocide off on black women, trying to eliminate our race, pushing those jive pills off on them. You don't force that off into your urban white, lily white neighborhoods. . ."

"Mary Ann Mallory (Orlando's mother), don't feel so bad. You haven't lost a son; you got a hero. Your son will go down in black history. He'll be enshrined when black people get their freedom. . ."

"You take advantage of us. You oppress us in our black ghettos, then when we rebel, then you come in with

your tanks and National Guards and you spray black people with all that tear gas and you just take advantage of black people. . ."

"We're tired, white man. We're tired of being hassled, pushed around, told what to do and then having to send our kids to school with you and your funky white offspring, those things, those stringy-haired things you call your kids. . ."

"You see, you white devil, our minds are far superior to that of a white man due to the fact that you have a six-ounce brain and the black man has a seven-and-a-half ounce brain. . ."

"The reason Stephen was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed; you can tell it must have been made in America because it wasn't worth a shit. He was stabbed in the back, in the chest and the stomach, ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes. . ."

"He died in style, though, begging, begging and pleading for mercy, just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people. . ."

> "We are everywhere; you cannot hide from us. You have told your people to get off the streets and to stay home. That will not help, for one night they will come home and we will be there waiting. It has been said, look for us and you cannot see us; listen for us and you cannot hear us; feel for us and you cannot touch us. These are the characteristics of an urban guerilla."

All of the tapes ended with the words "Signed, Your Black Liberation Army."

William Hearn, one of the five persons present at the murder of Orlando, testified that he witnessed the murder and told of the particpation of Barclay, Dougan, Evans and Crittendon - and he, together with witnesses James Mattison, Edred Black and Otis Bess, Jr., stated that they were present when the boastful tapes were made and they identified the voices of Barclay and Dougan when the tapes were played to the jury.

In defense, Barclay admitted making the tapes for political reasons - but denied any participation in the murder. Dougan also denied the murder and the death note - but admitted he made the tapes based on newspaper accounts of the crime. He said that the purpose of the tapes was to dramatize the plight of black people. Each defendant had alibis as to his whereabouts at the time of the murder, but the jury found them all guilty of murder.

The jury found both Barclay and Dougan guilty of murder in the first degree and in its advisory sentence the jury recommended death for Dougan by a vote of ten to two. In its advisory sentence the jury recommended life imprisonment for Barclay by a seven to five vote.

That thereafter this Court denied motions for a new trial and adjudged each guilty of murder in the first degree.

EXPLANATION

Before imposing the sentence for Murder in the First Degree, this Judge has considered those matters brought out by the defendant, Mr. Barclay, in his responses to the PSI. The Court has also closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in the Florida Statutes and which were guidelines for the jury in considering its advisory sentences.

The Court has summarized the facts as brought out in the trial, in the presentence reports, in defendant's response to the presentence report and has applied them to each element of aggravation and mitigation where applicable.

The elements of Aggravation and Mitigation have been summarized below in reverse order.

SUMMARIZATION OF MITIGATION ELEMENTS

A. WHETHER DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

FACT:

The defendant, Barclay, has an extensive criminal record of seven prior arrests. It shows that he had previously been on probation for the crime of uttering a forgery, and that subsequently that probation was revoked and he was sentenced to a term of six months County Jail. It also shows that he had previously been on five years probation for the crime of Breaking and Entering and Grand Larceny. There are also a number of misdemeanor crimes charged. (See PSI)

CONCLUSION:

There is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record showing at least one prior felony conviction and one prior felony probation.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

FACT:

That Barclay raised no defense of insanity or emotional instability. He had an alibi for the time of the crime and proclaimed his innocence. Nor was there any evidence from the PSI that he suffered emotional disturbances in the past or at the time

of trial. In the proceedings for response to the PSI there was no evidence or testimony that he was under the influence of extreme mental or emotional disturbance at the time of the murder.

CONCLUSION

There is no mitigating circumstance under this paragraph because there is no evidence of extreme mental or emotional disturbance in the past, at the time of the murder - or at the time of trial.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE CONDUCT OF THE DEFENDANT OR CONSENTED TO THE ACT

FACT:

The defendant Barclay, together with

Dougan, Crittendon and Evans, had previously decided upon a course of homicide and were looking for a victim when they spotted Stephen Anthony Orlando and offered him a ride. There was evidence and testimony that the victim urged they take him to a house - so that he could get out and away from his abductors. Instead, he was taken to a trash dump and there the unarmed youth was ordered out of the car - knocked to the ground - stabbed repeatedly by Barclay and shot by Dougan.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant Barclay and the others

intended to kill Orlando at the time he got into the car. Orlando could not, and would not, in any way, consent to his own murder, and in fact, begged for mercy - all in vain.

D. WHETHER DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR

FACT:

The participation by Crittendon and Evans was lesser in degree and they have been adjudged guilty of murder in the second degree and each sentenced to 199 years imprisonment.

FACT:

Both Barclay and Dougan were the

major and primary participants in the murder. The evidence shows that the homicidal assault was initiated by Barclay who threw the victim to the ground and repeatedly stabbed him in the chest with a knife - as Orlando pleaded for his life. Then Dougan rendered the Coup De Grace by shooting the victim twice in the head.

A close attention to Barclay's boastful remarks on the tapes will lead any listener to conclude that he was a major participant and proud of that participation. Had Dougan been the only major participant - then perhaps Orlando, who was struggling for his life, might have been able to escape. But Barclay

and Dougan acting in concert overpowered, stabbed and shot their common prey.

FACT:

The evidence showed that Barclay struck the first homicidal blow of the murder by repeatedly stabbing the victim. Dougan was the originator of the plan and twice shot the helpless captive after Barclay put the killing in motion - but it was the two of them acting in concert - who were the primary culprits. Crittendon and Evans were lesser participants - which fact was recognized by the jury finding Dougan and Barclay guilty of murder in the first degree and the others guilty of second degree murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to Barclay - who initiated the homicidal frenzy and was a major participant in the murder while acting in concert with Dougan.

E. WHETHER DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

FACT:

Never, at any time, in any way, was it shown that any of the defendants acted under duress of any kind. The defendant, Barclay, had a criminal record of seven arrests - showing a felony conviction, a misdemeanor conviction and a felony probation.

He is, or was, a married man with several children. He had gone through senior high school and was of average, or above, intelligence. It was not contended by Barclay that he was under substantial domination of Dougan or any other person. Had such dominance been apparent, then perhaps the jury would have found Barclay guilty of a crime less than first degree murder.

FACT:

That in the responses to the presentence report the defense attorney adduced testimony from the lead investigating officer in the murder - and that officer named Barclay as second in command of the members of the Black Liberation Army. He

stated that in his opinion both Barclay and Dougan exerted influence over the other members of the gang. He further stated on cross examination by the State Attorney that Barclay had leadership traits, was intelligent, acted of his own free will and was not under the domination of anyone at the time of the murder.

FACT:

That neither Barclay or [sic] Dougan were under the substantial domination of the other as they committed the dastardly murder - and each vyed [sic] to outdo the other in homicidal ferocity.

CONCLUSION:

There is no mitigating circumstance

as to the defendant under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED

FACT:

The defendant Barclay had been through the criminal justice system and was a convicted felon. He well understood the criminality of his conduct.

FACT:

There was never any suggestion or claim of insanity or any showing by any evidence - at trial or

in response to the PSI - that Barclay did not appreciate the criminality of his acts or that he could not conform his conduct to the requirements of the law. The evidence showed that upon setting out on a homicidal course that there was ample opportunity for Barclay to withdraw from the plot, but he and the others calculatedly and premeditatedly stalked their victim and produced his death - knowing the full consequences thereof.

FACT:

There is no evidence or testimony in trial, in response to PSI or at any other place that even suggests that Barclay was incapable of appreciating the criminality of his

acts or conforming his conduct to the requirements of the law.

CONCLUSION:

There is no mitigating circumstance under this paragraph as to Barclay.

G. THE AGE OF DEFENDANT AT THE TIME OF THE CRIME

FACT:

The defendant Barclay was twenty-three years of age, had finished senior high school, had married in 1969, fathered five children and he and his wife were separated at the time of the crime. According to the PSI he had subsequently fathered another child by another woman, and had worked, not too successfully, at various jobs. He was a mature male, in good health, standing five feet

ten inches tall and weighing one hundred and sixty pounds. He also had some expertise in karate. He was five years older and larger than his eighteen year old victim.

CONCLUSION:

There is no mitigating circumstance as to defendant under this paragraph.

SUMMARIZATION OF AGGRAVATING ELEMENTS

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE HAS BEEN CONVICTED

FACT:

The defendant, Barclay, was not under sentence of imprisonment at the time of the commission of this

murder. His rap sheet shows seven prior arrests and he had previously been convicted of a felony and had been on felony probation.

CONCLUSION:

Although not imprisoned, the criminal record of Barclay is an aggravating circumstance.

B. WHETHER THE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON

FACT:

The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use

or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into.

CONCLUSION:

This is more of an aggravating than a negative circumstance.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS

FACT:

The testimony and evidence showed that Barclay and the other defendants drove around various areas of the City looking for a victim or victims - thus potentially exposing

numbers of people to a great risk of death. On at least two occasions the defendants parked their car - and cased areas where they had chosen potential victims - but were thwarted by the circumstances that fortuitously existed. Five persons were exposed to their planned murder and it was not out of concern for the lives of many persons that only a single victim was chosen - but rather out of concern for their own detection and capture.

The tapes made by Barclay and Dougan - which were sent to the media - were a declaration of war by the murderers against white people. It was a call for others to join in

their homicidal schemes and it was a call for revolution and racial war between a black and white population - if confined to Jacksonville - of over one-half million persons.

Barclay and the other defendants did, in fact, knowingly create a great risk of death to many persons. The extent of that danger - had they been successful to any degree - boggles the mind by contemplating the monstrous consequences.

CONCLUSION:

There is an aggravating circumstance here because not only did Barclay and the other defendants murder Stephen Anthony Orlando - they also created a great risk of death to others, before, during and after

the murder.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB

FACT:

The only element of this aggravating circumstance applicable to this case is the crime of kidnapping which - as applicable to this case - is defined in F.S. 787.01 as:

> "(1)(a) Forcibly, secretly, or by threat confining, abducting, or imprisoning another person

against his will and without lawful authority, with intent to:

2. Commit or facilitate commission of any felony.

3. Inflict bodily harm upon or terrorize the victim or another person."

The facts of this murder were that the defendants picked up the hitchhiking victim with intent to murder him. They refused to take him to the place requested and by force and/or threats kept him in their car until they found an appropriate place for the murder. The victim was then removed from the car - brutalized and murdered. Each essential element of kidnapping was certainly present in this case.

CONCLUSION:

There is an aggravating circumstance as to the defendant under this paragraph.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY

CONCLUSION:

This paragraph does not seem to apply to the present case.

F. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN

CONCLUSION:

This paragraph does not seem to apply to the present case.

G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS

FACT:

More than any other factor, this paragraph together with the racial hatred murder - seems to have been one of the primary motives for the murder. The stalking of an innocent victim and slaughtering him only because he was of a different race than his murderers and then using a knife to stick a note in his body - which read:

> "Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will

be victorious. The revolution will end when we are free."

This was a call to revolution. The tapes made by Barclay and the others and sent to the media was a further and more violent call for a race war and for revolution. Typical excerpts of the tapes are as follows on the next two pages.

> "To the oppressive state: This is directed to enemy Mary Ann Mallory, Lt. E. A. Orlando (the victim's mother and father) and especially pig Garrett. Stephen A. Orlando was not murdered; he was executed and made to pay for the political crimes that have been perpetrated upon black people. No longer will your crimes go unpunished. A revolution has begun and you are the enemy.
>
> "You white racist Americans, because your nature is that of a white devil you can never do right. So the black man's freedom depends upon your defeat or your death. The revolution will end only

when you are dead or when black people are free.

"Mary Ann Mallory, you should be proud that you [sic] son, Stephen, was the first to die for our black cause. Many more will follow him until we are free. I know that pig Garrett did not want to publicize the contents of the execution note found on Stephen's dead body, but he knows that revolution is very serious. He should be alarmed for now he knows that he and people like him will have to pay for their crimes. Black people have given us support in what we are doing because you will not listen to nothing (sic) else but that which comes from the barrel of a gun.

"The reason Stephen was only shot twice in the head was because the gun jammed. He was stabbed in the back, chest and the stomach to symbolize the 400 years of hangings, castrations, brutalities and rapings of my black people. He begged, oh yes, he begged for mercy as did my people when you murdered them, and we gave him no mercy, that's right, no mercy, for every time I pulled [sic] trigger, every time I saw

the knife go inside his body, satisfaction came unto me because I knew, I knew, that the people who died because of him, because of his ancestors and because of you were now being repaid.

"Remember, white racist America, this could happen to you also as long as black people are oppressed. We as black people are no longer begging anymore. Even we will take what is ours, what is rightly ours. We created it so we should have it. The Black Liberation Army will destroy you. They will destroy everything that stands in the way of the black man's freedom. To all my black people, black warriors have emerged on the scene to show you to the way to freedom and the destruction of our enemy, the white man. White people, prepare yourself to die. From your Black Liberation Army."

FACT:

The messages and actions of Barclay and the other defendants were, in all ways, a call to disrupt and hinder the lawful exercise of governmental functions and the enforcement of the laws. It was a call to destroy our government and its laws by violent racial revolution.

CONCLUSION:

This is an aggravating circumstance.

H. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

FACT:

The defendant Barclay, together with the other defendants, premeditatedly

and deliberately stalked their victim and brutally murdered him.

The victim's only crime was that he was of a different racial group than his murderers. He in no way offended them - except by being white - nor did he even know them before that fatal evening.

The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head a close range.

In addition to an unprovoked, premeditated murder - it was a declaration of war against a racial group - with the promise of more violence,

death and revolution to come.

Such acts of Barclay and the other defendants were of the basest, most callous homicidal type and shriek out for the severest punishment and the termination of the existence of the perpetrator.

CONCLUSION:

That the murder of which the defendant Barclay was convicted was especially heinous, atrocious and cruel.

COMMENT

That the defendant Barclay did not present any matters in his responses to the PSI which mitigated the heinous, atrocious and cruel nature of this crime.

That the passage of approximately five years from the date of this murder until the date of this sentence - has not diminished the nature of this crime. Stephen Anthony Orlando was murdered and the facts of the crime and the call for bloodshed and revolution are the same.

CONCLUSION OF THE COURT

THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH AS TO THE DEFENDANT ELWOOD CLARK BARCLAY.

AUTHORITY FOR SENTENCE

That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life

imprisonment. This is an awesome burden to be placed upon the Judge - but in the landmark Florida case of State v. Dixon, 283 So.2d 1, the Florida Supreme Court said that when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory," then it meets the test of Furman v. Georgia, 408 U.S. 238.

COMMENTS OF JUDGE

My twenty-eight years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office, a prosecutor for eight and one-half years and a Criminal Court and Circuit Court Judge - Felony Division - for almost ten years. During these twenty-eight years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience, I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined

to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination.

To attempt to initiate such a race war in this country is too horrible to contemplate for both our black and white citizens. Such an attempt must be dealt with by just and swift legal proces and when justified by a Jury verdict of guilty - then to terminate and remove permanently from society those who would choose to initiate this diabolical course.

HAD THE DEFENDANT BEEN EXPOSED TO THE CARNAGE OF THE BATTLEFIELDS AND THE HORRORS

OF THE CONCENTRATION CAMPS INSTEAD OF MOVIES, TELEVISION PROGRAMS AND REVOLUTIONARY TRACTS GLORIFYING VIOLENCE AND RACIAL STRIFE - THEN PERHAPS HIS THOUGHTS AND ACTIONS WOULD HAVE TAKEN A LESS VIOLENT COURSE.

Having set forth my personal experiences above, it is understandable that I am not easily shocked or moved by tragedy - but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits further right to life - for certainly his life is no more sacred than that of the innocent eighteen year old victim, Stephen Anthony Orlando.

S E N T E N C E

Having adjudged ELWOOD CLARK BARCLAY guilty

of Murder in the First Degree, I hereby sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set.

That on such day, as set, you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today to take an appeal from the sentence which I have just imposed upon you and I hereby appoint Bartley K. Vickers to represent you on such appeal.

May God have mercy upon your soul.

DONE AND ORDERED AND SENTENCED in Open

Court at the Duval County Courthouse, Jacksonville, Florida, on this 18th day of April, 1980.

/S/ R. Hudson Olliff

R. HUDSON OLLIFF, CIRCUIT JUDGE

Elwood Clark Barclay, Appellant,

v.

STATE OF FLORIDA, Appellee.

No. 47,260

Supreme Court of Florida

June 4, 1981

Rehearing Denied April 14, 1982.

PER CURIAM.

This case returns to us following our remand to the trial court in order to provide Barclay an opportunity to rebut or explain matters appearing in a presentence investigation report (PSI). Barclay v. State, 362 So.2d 657 (Fla. 1978). Before that remand, Barclay's conviction and sentence for first degree murder had been af-

firmed by this Court,[1] and review of that action had been denied by the United States Supreme Court.[2]

On remand Barclay was afforded several evidentiary hearings and argument of counsel. Only one witness was called on Barclay's behalf at the first hearing, principally to portray Barclay's lesser role in the events surrounding the murder, and to comment on a second murder with which he was not involved. At a second hearing, Barclay's counsel argued extensively against the reimposition of the death penalty, but offered virtually no evidence in derogation of the information contained in the PSI. The trial judge concluded during a later

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1. Barclay v. Florida, 343 So.2d 1266 (Fla. 1977).

2. Barclay v. Florida, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978).

sentencing proceeding that he had "carefully considered all of those matters presented by the defendant in response to the presentence investigation report, and [found] nothing in such responses which mitigates any circumstance herein." Our independent review of the record in this case completely supports this conclusion.

Barclay now challenges the reimposition of a death sentence, primarily by argument against the findings previously reviewed here and affirmed. We cannot accept counsel's suggestion that we abrogate the "law of the case". See Dougan v. State, 398 So. 2d 439 (Fla. 1981). The dictates of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), have been met, and no defect in the original sentencing order has been identified

as stemming from improper material in the PSI. There being no reason to reconsider the matters previously analyzed, we again affirm the trial judge's sentence of death.

It is so ordered.

ADKINS, Acting C.J., and BOYD, ENGLAND and ALDERMAN, JJ., Concur.
OVERTON and McDONALD, JJ., dissent.

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 14, 1982

ELWOOD CLARK BARCLAY,	*	
	*	
Appellant,	*	CASE NO. 47,260
	*	
v.	*	Circuit Court No.
	*	74-4139-CF
STATE OF FLORIDA,	*	(Duval)
	*	
Appellee.	*	
	*	

****

There not being four (4) votes to rehear, the Motion for Rehearing filed in the above case is hereby denied.

ADKINS, Acting C.J., BOYD and ALDERMAN, JJ., would deny rehearing
OVERTON, McDONALD and EHRLICH, JJ., would grant rehearing

TC
cc: Hon. S. Morgan Slaughter, Clerk
Hon. R. Hudson Olliff, Judge
Wallace E. Allbritton, Esquire
Kenneth Vickers, Esquire

A True Copy
TEST:
Sid J. White
Clerk, Supreme Court

By:/s/Tanya Carroll
Deputy Clerk

ORIGINAL COPY

No. 81-6908

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

ELWOOD BARCLAY,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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No. 81-6908

IN THE

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October Term, 1981

ELWOOD BARCLAY,

Petitioner,

-v-

STATE OF FLORIDA,

Respondent.

_____/

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The original opinion of the Supreme Court of Florida is reported as Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978). The opinion remanding the case to the trial court for a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977), is reported as Barclay v. State, 362 So.2d 657 (Fla. 1978). Following the hearings in the trial court, appeal was taken to the Florida Supreme Court and the decision of that court is not yet reported. See Barclay v. State, _____ So.2d_____(Fla. 1982), Case No. 47,260, decided June 4, 1981, rehearing denied, April 14, 1982. (Petitioner's Appendix, pp. 9-12).

JURISDICTION

Respondent has no quarrel with the jurisdiction of this court pursuant to Title 28, U.S.C., § 1257(3), or any other

provision thereof, at least for the purpose of determining whether to decline assumption thereof.

STATEMENT OF THE CASE

Respondent accepts the Statement of the Case as set forth on pp. 2, 3 of the petition with the exception of the language in the last paragraph on p. 2 indicating that the trial judge found "mitigating circumstances."

STATEMENT OF THE FACTS

By order dated September 7, 1978, the Florida Supreme Court vacated the death sentence previously imposed on petitioner and codefendant Dougan and remanded the cause to the trial court with directions to provide a hearing for the purpose of affording petitioner an opportunity to rebut any of the information contained in the presentence investigation reports. Barclay v. State, 362 So.2d 657 (Fla. 1978).

At the initial hearing in the lower court on June 22, 1979, the only witness called by petitioner was Thomas E. Reeves (Tr. 5). Deputy Reeves was employed by the Office of Sheriff, Jacksonville, Florida, and testified generally as to his background and experience. He investigated the murder of Stephen Orlando and Stephen Roberts. Deputy Reeves explained his part in the investigation of both cases (Tr. 5-15). In response to questioning by petitioner's counsel, Deputy Reeves gave it as his opinion that the murder of Stephen Orlando was cruel, atrocious, and heinous (Tr. 16). In contrasting the testimony of Mr. Hern with that of the tapes as to whether Stephen Orlando begged for mercy, Deputy Reeves stated that he assumed what was on the tapes was correct "because it came from the mouth of the defendant who made the tapes".

(Tr. 18, lines 18, 19). He then gave his opinion as to the purpose of the tapes and in response to further interrogation stated:

> A In my opinion, they did everything that they said they did on the tapes. They could have stretched the truth some or they could have left something out, they could have added something. I don't know. I'm only assuming that what they said on the tapes is what they did.

(Tr. 20).

In responding to the question as to whether petitioner exerted as much influence over the group as codefendant Dougan, the witness replied that if he had to say that there was a second in command, he would say that it was petitioner (Tr. 24).

As to the extent of petitioner's participation in the murder of Stephen Orlando, note the following quoted from Deputy Reeves' testimony on cross-examination:

> Q From the evidence at the trial, Officer Reeves, didn't this convicted man over here, Barclay, ride around all afternoon with Dougan in the car looking for a victim to murder?
>
> A. That's correct.
>
> Q. Did Barclay, at the scene of the crime, aid in holding the defendant Orlando down on the ground?
>
> A Yes, he did, sir.
>
> Q Did he stab him with a knife prior to his being shot by Dougan?
>
> A Yes, he did, sir.
>
> Q Was there any evidence that Dougan told him to stab him, that you know of?
>
> A No, there is not. There is evidence --
>
> Q Huh?
>
> A There is evidence that Barclay took the knife from Evans because Evans was having difficulty getting the knife to penetrate Orlando's chest, and there was a little --
>
> Q Barclay took over?

A Barclay took the knife from Evans.

Q Took over; didn't he?

A And told him if he couldn't do it, he could.

* * * * *

Q Was Barclay's voice on that tape?

A Yes, it was.

Q Did he brag about the killing?

A Yes, sir.

Q And then he ran; didn't he?

A Yes, sir.

Q You had occasion in solving this case to observe this convicted murdered, Barclay?

A Yes, I did, sir.

Q. Now, the word dominate means a lot of things to a lot of different people, Officer Reeves. Do you feel that from your investigation of this case that Barclay carried out these acts of his own free will?

A Yes, I do.

Q Do you thing he was intelligent enough to know what he was doing?

A Yes.

Q Did he appear to you to be under the influence of dope or drugs or alcohol when he was carrying out these acts?

A No.

Q Do you think, in your opinion, did he intend the consequences of these acts in relationship to Stephen ORlando?

A Yes.

(Tr. 27, 28, 29).

The trial judge reminded counsel for petitioner that codefendant Evans and Crittendon were convicted by the jury of murder in the second degree in the Orlando murder and that subsequently they entered a plea of guilty to second degree murder in the Roberts case. Both were sentenced to 199 years in

each case making a total sentence of 398 years for each of them (Tr. 34, line 18--p. 35, line 7).

Petitioner did mention the PSI by referring to a burglary conviction of June 16, 1971 noted therein. This was in connection with the trial judge having found that Petitioner had been previously convicted of a felony involving the use of threat or violence to the person. The point petitioner was making was that the PSI didn't show whether violence or the threat of violence was involved in this particular conviction for breaking and entering with intent to commit grand larceny. Petitioner indicated that he would supplement the record if the necessary reports could be found (Tr. 45, line 10-- p. 47, line 12). Petitioner chose not to testify at the hearing (Tr. 48) and stated that he was satisfied with the services of his counsel (Tr. 50). Petitioner's counsel requested that he be allowed to present his argument in behalf of appellant subsequent to the hearing in which codefendant Dougan would present responses to the PSI. The trial judge was agreeable to this request (Tr. 52).

Oral arguments were heard on October 23, 1979. The first part of petitioner's argument was directed to what he considered "basic defects in the original sentencing order" (Tr. 56, lines 16, 17). Since much of petitioner's argument was directed to the original judgment and sentence, extensive references were made to the original transcript (Tr. 58). The trial judge's findings of fact were challenged as being "totally erroneous" (Tr. 59). Petitioner admitted that he had two prior convictions (Tr. 61). Extensive remarks were adressed to the issue of whether the victim begged for mercy (Tr. 65, 66). Comment was made on the fact that Petitioner did not participate in the Roberts' murder and that in the Orlando murder codefendant Evans was the first to start stabbing the victim and then appellant took over and continued the stabbing (Tr. 67, 68). The remainder of

petitioner's argument was directed towards challenging the trial judge's findings of fact and the determination of applicable mitigating and aggravating factors at his trial in February 1975 (Tr. 70-95).

In his response to petitioner's argument, the state attorney rebutted the argument challenging the validity of the aggravating and mitigating factors as previously determined by the trial judge (Tr. 96, line 20-- p. 108, line 8). However, the state attorney's basic position was stated as follows:

> I have carefully considered all of those matters presented by the defendant in response to the presentence investigation report, and I find nothing in such responses which mitigates any circumstance herein

(Tr. 126)

Appellant Barclay was sentenced to death (Tr. 128, line 14-- p. 129, line).

QUESTIONS PRESENTED

The issues set forth on p. 3 of the petition have previously been rejected by this Court. Barclay v. Florida, 439 U.S. 892 (1978). In Barclay v. State, 362 So.2d 657 (Fla. 1978), the Florida Supreme Court relinquished jurisdiction for the purpose of affording petitioner an opportunity to respond to the presentence investigation report that had been used at his initial sentencing. The court's order limited the scope and purpose of the hearing as follows:

> To assure that the sentencing procedure in this case satisfies the constitutional command of the Due Process Clause, the death sentences are vacated and the cause is remanded to the trial court. The court is directed to provide a hearing at which the defense has the opportunity to rebut any of the information contained in the presentence investigation reports, whether in the confidential portion of the report or any other part. This direction, of

> course, requires that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal. Following the hearing the court is to impose sentences. If death is imposed as to either appellant there will be available in this Court review, limited to matters related to compliance with this order.

362 So.2d, at 658. This was done. On June 22, 1979, October 23, 1979, and April 18, 1980, plenary hearings were held in response to the above-quoted order of the Florida Supreme Court. Petitioner was given the opportunity of calling any number of witnesses for the purpose of rebutting anything in the presentence investigation report that he deemed harmful or incorrect. At the conclusion of the hearing, the trial judge reimposed the death penalty. (Petitioner's Appendix, pp. 14-43.) Consequently, petitioner does not present this Court with any issue arising out of the Gardner proceedings either at the trial level or on review by the Florida Supreme Court. Rather, petitioner presents this Court with two issues that have previously been rejected by the Florida Supreme Court and this Court. Barclay v. Florida, 439 U.S. 892 (1978). Because this is a death case, respondent restates the issues as framed by petitioner as one issue:

WHETHER PETITIONER'S DEATH PENALTY WAS LAWFULLY IMPOSED.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

As the trial judge found, the aggravating circumstances identified outweighed any possible mitigating circumstances. In fact, there were no mitigating circumstances.

In determining that petitioner knowingly created a great risk of death to many persons, § 921.141(5)(c), F.S., the trial judge found as follows:

FACT:

The testimony and evidence showed that Barclay and the other defendants drove around various areas of the City looking for a victim or victims - thus potentially exposing numbers of people to a great risk of death. On at least two occasions the defendants parked their car - and cased areas where they had chosen potential victims - but were thwarted by the circumstances that fortuitously existed. Five persons were exposed to their planned murder and it was not out of concern for the lives of many persons that only a single victim was chosen - but rather out of concern for their own detection and capture. The tapes made by Barclay and Dougan - which were sent to the media - were a declaration of war by the murderers against white people. It was a call for others to join in their homicidal schemes and it was a call for revolution and racial war between a black and white population - if confined to Jacksonville - of over one-half million persons. Barclay and the other defendants did, in fact, knowingly create a great risk of death to many persons. The extent of that danger - had they been successful to any degree - boggles the mind by contemplanting the monstrous consequences.

CONCLUSION:

There is an aggravating circumstance here because not only did Barclay and the other defendants murder Stephen Anthony Orlando - they also created a great risk of death to others, before, during and after the murder.

(R 77, 78)

The trial judge found that the murder for which petitioner was convicted was committed while he was engaged in the crime of kidnapping, § 921.141(5)(d), F.S., as proscribed by § 787.01, F.S. (1979). Petitioner may be heard to complain that the trial judge erred because § 787.01, F.S., was not on the books at the time the Orlando murder was committed on June 16, 1974. Not so. It is true that § 805.02, F.S. (1973), proscribed the crime of kidnapping for ransom. But this isn't the end of the matter! Petitioner conveniently overlooks § 805.01, F.S. (1973), which provides as follows:

805.01 False imprisonment and kidnapping. -- Whoever without lawful authority forcibly or secretly confines or imprisons another person within this state against his will, or confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned in this state against his will, or to cause him to be sent out of this state against his will; and whoever sells, or in any manner transfers, for any term, the service or labor of any other person who has been unlawfully seized, taken, inveigled or kidnapped from this state to any other state, place or county shall be guilty of a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Thus, petitioner's active participation in the murder of Stephen Orlando abundantly supplies the elements of the crime of kidnapping as set forth in the 1973 statute, as well as the present statute quoted in part by the trial judge (Petitioner's appendix, p.37). This aggravating circumstance was approved by the Florida Supreme Court on initial review. Barclay, 343 So.2d, at 1271. It is noted that Barclay was decided March 17, 1977, approximately eighteen (18) months after the effective date of the present kidnapping statute, i.e., October 1, 1975. The Florida Supreme Court properly applied the law as it existed when the appeal was decided.

The trial judge found that the murder for which petitioner was convicted was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws. § 921.141(5)(g), F.S. On initial review, the Florida Supreme Court approved this aggravating circumstance. Barclay, 343 So.2d, at 1271.

The trial judge found that the murder for which petitioner had been convicted was especially heinous, atrocious and cruel. § 921.141(5)(h), F.S. See petitioner's appendix, pp. 42, 43. On petitioner's initial review, the Florida Supreme Court put its

stamp of approval on this aggravating circumstance, as well as several others. Respondent quotes from the Barclay opinion:

> Four others were present to some degree, namely that Dougan's crime had created a great risk of death to many persons, had been committed while engaged in a kidnapping, had endeavored to disrupt governmental functions and law enforcement, and had been especially heinous, atrocious and cruel. These findings are also well documented in the record before us. . . .
>
> As regards Barclay, who had received a life recommendation from the jury, virtually the same considerations apply with respect to consequences of the criminal episode.

Id. at 1271. The remarks of the state attorney at the Gardner hearing in the trial court adequately expresses respondent's opinion on this issue. For the convenience of this Court, we quote the following:

> The cruel, heinous and atrocious aspect of it, this boy was not hurting anybody, he was sitting on a curb in Jacksonville Beach, Florida. They got him into the car on the pretense of taking him somewhere. They took him -- once he realized they were not going where he wanted to, they just kept him in the car, took him down off of a paved road, down near Ponte Vedra, drove up a dirt road near a garbage dump at night, a total stranger. This is a young high school boy. He is surrounded by five men, all older, large, most of them, strangers, total strangers to him of a different race for whatever significance that is.
>
> They got him out of the car by this dump on a dirt road and when he started to try to run they knocked him down, they hit him and knocked him to the ground. He had time at that point to know the terror and the fear of what was going to happen to him, that he was going to die. He knew he was going to die. He said, "[h]ere, please take my marijuana cigarette and let me go." He knew he was going to die. But with these people standing around him, this man took a knife and tried to penetrate Stephen Orlando's body with that knife. It was a pocketknife, it really didn't do the job. It must have hurt a great deal. They were trying to put it into Stephen Orlando's body but it just wouldn't quite go and do the job to kill him that he

intended it to. And this man stabbed him a number of times with a pocktknife, I think five or six times, I don't remember the medical testimony, I don't think it's material. But he tried to repeatedly, to stab Stephen Orlando. Stephen Orlando didn't die at first, so he had time to suffer, to agonize, to know as a young as a young person would know best of all that his young life was about to be snuffed out for no reason by total absolute strangers.

And then Dougan went over, and my recollection is, I think it's in the deposition or in the trial, that he put his foot on Stephen Orlando's neck and put a pistol -- .22 pistol to his head and shot him in the head and he died at that point pretty quickly.

* * * * *

This is, you know, an 18-year-old boy. It just -- hadn't even started to live. I don't know what the Court has in mind totally on specially atrocious, heinous and cruel, but if this isn't it, I don't know where they are going to find it. I don't know if we have to envision some torture or not, I don't think so. But they do envision this as being an atrocious, heinous, and cruel because they said so in this report.

(Tr. 102-104)

Petitioner seems to urge that his death sentence is based in part on a nonstatutory aggravating circumstance. The trial judge did find that although not imprisoned, petitioner's criminal record was an aggravating circumstance. However, in Mikenas v. State, 367 So.2d 606 (Fla. 1979), the Florida Supreme Court had this to say:

> In capital cases, it is this court's responsibility to insure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes, in the sentencing process. It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. It was not done in this case. A substantial history of prior criminal activity is not an aggravating circumstance under the

> statute. Since mitigating circumstances are present, Elledge, supra, dictates resentencing.

Id. at 610. But as to petitioner, there were no mitigating circumstances! Consequently, the rationale of Ellege v. State, 346 So.2d 998 (Fla. 1977), does not require a resentencing. Any argument to the contrary must be viewed as nothing less than an outright repudiation of this Court's holding in Proffitt v. Florida, 428 U.S. 242 (1976). The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has the propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly, through his intentional act, created a great risk of serious bodily harm and death to many persons.

428 U.S., at 246. This is interesting because the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute. See Proffitt, 428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The unmistakable conclusion is that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty. It is noted that petitioner's trial date was February 21-March 4, 1975; however, the case of Purdy v. State, 343 So.2d 4 (Fla. 1977), restricting the use of aggravating circumstances to those enumerated in the statute was not decided until March of 1977, approximately two years following the date of petitioner's trial.

It should be emphasized that what mandated the result reached in Elledge v. State, supra, was from the record before it

that the Florida Supreme Court could not determine whether the trial judge had permitted a statutory mitigating circumstance to be offset by a nonstatutory aggravating circumstance. But in the instant case, the trial judge found that there were no mitigating circumstances. Therefore, there could be no danger of a non-statutory aggravating circumstance offsetting a statutory mitigating circumstance in the weighing process. The Elledge court did not condemn the use of nonstatutory aggravating circumstances as long as they were not used by the trial judge in offsetting statutory mitigating circumstances. See also Douglas v. State, 373 So.2d 895 (Fla. 1979); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Brown v. State, 381 So.2d 690 (Fla. 1980). Frankly, it is difficult to understand how the consideration of one nonstatutory aggravating circumstance, along with several statutory aggravating circumstances, can be assigned as constitutional error when it was proper at that time for the trial judge so to do.

Following the Gardner hearing in the trial court, the trial judge found that petitioner had been previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. As to this issue, the trial judge specifically found as follows:

> FACT:
>
> The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felony of grand larceny. It is not known if such prior felony involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into.
>
> CONCLUSION:
>
> This is more of an aggravating than a negative circumstance.

(Petitioner's appendix, pp. 35, 36.) Petitioner seems to be

urging that the trial judge engaged in speculation in determining that his prior felony conviction for breaking and entering with intent to commit grand larceny involved the use or threat of violence to the person. By the same token, respondent urges that petitioner is now asking this Court to speculate in second-guessing the trial judge by holding that petitioner's breaking and entering conviction did not involve the use or threat of violence to the person. Petitioner had every opportunity to submit evidence on this issue at the hearing below. In fact, this was the purpose of the hearing, i.e., to permit him to respond by denying, correcting or mitigating anything unfavorable in the presentence investigation report. If, in fact, petitioner's prior breaking and entering conviction did not involve the use or threat of violence to the person, this could have been proven at the hearing below. Petitioner's appointed counsel was far from being a novice in the field of criminal law. His failure to submit evidence on this issue points to the unmistakable conclusion that the trial judge was correct in his determination. At the risk of being repetitious, the hearing below was granted for the purpose of permitting petitioner to respond to the presentence investigation report, not for the purpose of requiring the prosecution to once again prove the aggravating circumstances beyond a reasonable doubt. This had already been done at petitioner's trial, and the Florida Supreme Court on appellate review put its stamp of approval on the trial judge's determination of identifiable and proven aggravating circumstances.

Petitioner seems to take comfort in the recent decision of this Court in Zant v. Stephens, ____U.S.____ (1982), Vol. 31 CrL Reptr. 3035. Such reliance is misplaced. In Stephens, a Georgia jury sentenced a habeas petitioner to death based on a number of aggravating circumstances, including one circumstance

later held unconstitutional. 631 F.2d, at 405, 406. Because it was impossible for the reviewing court to determine the extent of the impact of the unconstitutional circumstance on the jury's verdict, i.e., whether the jury would have voted to impose the death sentence absent the invalid circumstance, the Fifth Circuit struck down the sentence. 631 F.2d, at 406.

The focus of the Stephens case was on the impossibility of rational review of the Georgia jury's actions, and that decision did not forge a rigid rule rendering unconstitutional the imposition of the death penalty in all cases in which invalid aggravating circumstances are considered by the sentencing authority. The Georgia statute involved in Stephens differs from the Florida sentencing statute. For example, under the Georgia statute, the jury was not required to state what mitigating circumstances, if any, were considered; by contrast, under Florida law, the trial judge was at the time of petitioner's sentencing (and is today) required to prepare written findings reciting both aggravating and mitigating circumstances. The Florida Supreme Court has repeatedly held that reversal of death sentences is not required merely because invalid aggravating circumstances are considered, even when coupled with a mitigating circumstance, so long as it can be known that the result of the weighing process would not have been different had the impermissible factors not been present. Armstrong v. State, 399 So.2d 953 (Fla. 1981). It is submitted that Stephens does not impinge upon this rule. It should be noted that in the instant case, unlike Stephens, none of the alleged nonstatutory aggravating circumstances have been declared unconstitutional. Of course, neither have any of the statutory aggravating circumstances been declared unconstitutional.

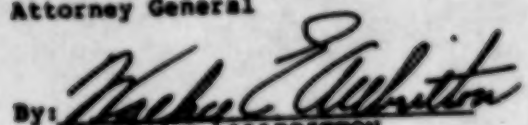
The recent decision of this Court in Enmund v. Florida, _____U.S.____(1982), Case No. 81-5321, decided July 2,

1982, can have no application to the facts of the instant case. Please see petitioner's appendix, the instant case. pp. 22-26; pp. 30, 31.

CONCLUSION

The petition for writ of certiorari should be denied.

JIM SMITH
Attorney General

By: 
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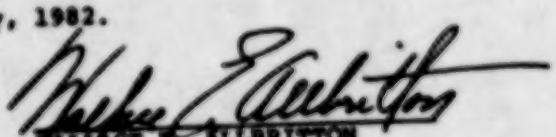
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Brief in Opposition to Mr. Elwood Barclay, in proper person, 437 East Monroe Street, Jacksonville, Florida 32202, by U.S. Mail, this 15th day of July, 1982.


WALLACE E. ALLBRITTON
of Counsel

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CASE NO. 81-6908

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELWOOD BARCLAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

COMES now respondent, the State of Florida, by and through the undersigned counsel, and hereby respectfully requests leave to file a supplemental brief of respondent. In support of said motion, the State of Florida would show:

I.

Respondent earlier filed Brief in Opposition to petitioner's prayer for writ of certiorari. Among the points presented by petitioner in support of his prayer for relief was the allegation that nonstatutory aggravating factors were

considered in the imposition of his sentence of death. The State of Florida responded to that allegation stating that a substantial federal question was not presented for several reasons.

II.

Recent developments in the Eleventh Circuit, specifically the decision of Proffitt v. Wainwright, No. 80-5977, _____F.2d_____(11th Cir. 1982), have changed the status of respondent's position in this cause. In Proffitt v. Wainwright, a rule disallowing the use of nonstatutory aggravating circumstances under any factual setting is announced. That holding is directly in opposition to the rule announced by the Florida Supreme Court in Brown v. State, 381 So.2d 690 (Fla. 1980); Elledge v. State, 346 So.2d 998 (Fla. 1977); Hargrave v. State, 366 So.2d 1 (Fla. 1979); Sireci v. State, 399 So.2d 964 (Fla. 1981).

III.

Direct conflict in the decisional law between the highest court of a state and any of the circuit courts of appeals provides a valid reason for the issuance of a writ of certiorari by this Court.

WHEREFORE, it appears that a substantial change has occurred in the position earlier taken by the State of Florida in the above-styled cause on the issue of the existence

of a substantial federal question. It is respondent's position that the writ should issue for the purpose of determining the validity of the use of nonstatutory aggravating circumstances previously approved by this Court in Proffitt v. Fla., 428 U.S. 506 (1976). It is for this reason that respondent requests leave to file a supplemental brief.

JIM SMITH
Attorney General

By: Wallace E. Allbritton
Assistant Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Motion to Mr. Bartley Kenneth Vickers, of Vickers & Rohan, P.A., Attorneys at Law, 437 East Monroe St., Jacksonville, Florida 32202, by U.S. Mail, this 24th day of September 1982.

Wallace E. Allbritton

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

CASE NO. 81-6908

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ELWOOD BARCLAY,

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SUPPLEMENTAL BRIEF OF RESPONDENT

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ARGUMENT

ISSUE

WHETHER THE FLORIDA SUPREME COURT PROPERLY UPHELD THE IMPOSITION OF THE DEATH PENALTY IN THE FACE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE.

Respondent, the State of Florida, earlier supplied this Court with a brief in opposition to petitioner's prayer for certiorari relief. The State of Florida now believes that petitioner's issue does present a substantial federal question in that the Florida Supreme Court, on numerous occasions, has held that the presence of an improper aggravating circumstance in sentencing does not necessarily cause a violation of the constitutional rights of the defendant. The Circuit Court of Appeals, Eleventh Circuit, recently dealt with the following issue in Proffitt v. Wainwright, ___F.2d____(11th Cir. 1982), (No. 80-5997, decided September 10, 1982):

> whether the construction of the eighth statutory aggravating factor [whether murder was committed in a heinous atrocious and cruel manner] evinced by the trial court's application of it to the facts of this case comports with the eighth amendment requirement that death sentences be based on clear, detailed, and rationally reviewable standards.

Slip op. at 2733.

The Eleventh Circuit substituted its judgment for that of the trial judge and determined that the eighth statutory

aggravating circumstance - heinous, atrocious, or cruel - was not present. Further, the court held that the use of a non-statutory aggravating circumstance--appellant has the propensity to commit the crime for which he was convicted and is a danger and menace to society--to be constitutionally impermissible.

Notwithstanding this Court's specific holding in Proffitt v. Florida, 428 U.S. 242 (1976), that non-statutory aggravating factors do not necessarily make the sentence unconstitutional, the Eleventh Circuit held:

> In considering appellant's "propensity to commit [murder]" and the danger he posed to society, the trial court transcended the list of aggravating factors set forth in the Florida statute and substituted its own judgment of what circumstances justified capital punishment for that of the Florida Legislature. In so doing, the trial judge not only committed error under the state law, see Brown v. State, 381 So.2d 690, 696 (Fla. 1980); Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); he also exceeded the federal constitutional limitations imposed by Furman on capital sentencing by increasing the risk that the death penalty would be imposed in an arbitrary and capricious manner.

This must be viewed as nothing less than an outright repudiation of this Court's holding in Proffitt v. Florida, supra. The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has a propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly,

> through his intentional act created a great risk of serious bodily harm and death to many persons.

At 246. This is particularly interesting because of the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute [§ 921.141, F.S. (1975)]. See Proffitt, 428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The unmistakable conclusion is that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty. This is diametrically opposed to the holding of the Eleventh Circuit in Proffitt v. Wainwright, supra.

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court was confronted with a situation where it was necessary to determine whether the use of a nonstatutory aggravating circumstance was constitutionally permissible. The court then engaged in an exhaustive analysis of Proffitt v. Florida, concluding as follows:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating circumstances where are are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the

> mitigating circumstances in the weighing process which is dictated by our statute. [Emphasis ours.]

Elledge at 1002, 1003. Consequently, under the reasoned analysis of Proffitt by the Florida Supreme Court, the existence of the statutory aggravating circumstance and the absence of mitigating circumstances renders unimportant the existence of nonstatutory aggravating circumstances. In petitioner's trial, the trial judge found that there were no mitigating circumstances. Thus, the Eleventh Circuit's decision in Proffitt v. Wainwright, supra, not only is contrary to the law of Florida, but is also contrary to this Court's holding in Proffitt.

As recently as July 15, 1982, the Florida Supreme Court in Ferguson v. State, 417 So.2d 639 (Fla. 1982), reaffirmed the principle that nonstatutory aggravating circumstances do not necessarily invalidate the sentence when no mitigating circumstances are found.

> Our negation of two of the aggravating circumstances found by the trial court would not change the result of this case in the absence of mitigating circumstances for there remain four valid aggravating circumstances. In such cases, reversal of the death sentence would not necessarily be required, as any error that occurred in the consideration of the two inapplicable aggravating circumstances was harmless. See Shriner v. State, 386 So.2d 525 (Fla. 1980), cert.denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 289 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912, 101 S.Ct. 300, 64 L.Ed.2d 862 (1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176

(1979); and Elledge v. State, 346 So.2d 998 (Fla. 1977).

At 646.

This issue should be decided by this Court. The courts of the State of Florida, relying on this Court's decision in Proffitt v. Florida, supra, are in direct conflict with the above cited decision of the Eleventh Circuit. The 9,000,000 citizens of Florida have the right to know which precedent is controlling. The failure to resolve this intolerable conflict will cause a significant number of cases to be upheld under the Florida standard, only to be reversed in the federal system.

CONCLUSION

Therefore, respondent feels that a substantial federal question has been presented by petitioner and therefore certiorari review should be granted by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Supplemental Brief to Mr. Bartley Kenneth Vickers, of Vickers & Rohan, P.A., 437 East Monroe Street, Jacksonville, Floirda 32202, by U.S. Mail this 24th day of September, 1982.

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Supreme Court, U.S.
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CLERK

No. 81-6908

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ELWOOD C. BARCLAY,

Petitioner,

—against—

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Whether a death sentence, imposed over a jury recommendation of life, violates the Eighth and Fourteenth Amendments when it is based upon a trial judge's findings of (a) factors not included in the roster of statutory aggravating circumstances; (b) factors found only by distorting the statutory aggravating circumstances beyond recognition; and (c) factors freighted with emotions arising from the judge's prior experiences, extraneous to the circumstances of the crime or the character of the defendant?

(2) Whether a death sentence imposed through such an arbitrary process can nonetheless be executed because the

trial judge may additionally have found one or more properly applicable statutory aggravating factors?

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No. 81-6908

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELWOOD C. BARCLAY,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment and findings of fact entered when petitioner was initially sentenced to die by the Circuit Court of Duval County, Florida are unreported and appear at J.A.

1-53. The initial opinion of the Supreme Court of Florida affirming petitioner's conviction of first degree murder and sentence of death by electrocution is reported in Barclay v. State, 343 So.2d 1266 (Fla. 1977); J.A. 54-77.

The subsequent order of the Supreme Court of Florida vacating the sentence of death and remanding for resentencing in light of Gardner v. Florida, 430 U.S. 349 (1977), is reported in Barclay v. State, 362 So.2d 657 (Fla. 1978); J.A. 78-81. The judgment and findings of fact on resentencing are unreported and appear at J.A. 82-141. The opinion of the Supreme Court of Florida affirming the reimposition of the death sentence is reported in Barclay v. State, 411 So.2d 1310 (Fla. 1981); J.A. 142-45.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having as-

serted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was entered on June 4, 1981. A timely petition for rehearing was denied by that court on April 14, 1982. The petition for certiorari was filed on June 16, 1982 and granted on November 8, 1982. ___ U.S. ___, 51 U.S.L.W. 3362 (U.S., Nov. 8, 1982) (No. 81-6908).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

This case also involves the following provisions of the statutes of the State of Florida, which are set forth in the Appendix to this brief: Fla. Stat. §§782.04, 921.141.

STATEMENT OF THE CASE

1. Introduction

On June 17, 1974, the dead body of eighteen-year-old Stephen A. Orlando was discovered on a dirt road in Jacksonville Beach, Florida. (T.T. 169).[1/] The cause of death was a bullet which entered the left ear.

1/ References to the transcript of Barclay's trial, held in the Circuit Court of the Fourth Judicial District in and for Duval County, Florida, from February 21, 1975, through March 4, 1975, are indicated by the abbreviation "T.T." followed by the number of the page(s) on which the reference may be found. The abbreviation "V.T." refers to the transcript of the voir dire; "S.T." to the transcript of the separate penalty trial held on March 5, 1975; "R." to the record on appeal; "R.T." to the transcript of the resentencing hearing on June 23, 1979, October 23, 1979, and April 18, 1980; "A." to the Appendix to Petitioner's Brief; and "J.A." to the Joint Appendix.

(T.T. 126, 133). Orlando also sustained another bullet wound in the cheek, and several superficial stab wounds. (T.T. 126). A note was found under a small pocketknife lying on his stomach. (T.T. 317-18, 321, 324).[2/] The note stated that "the revolution" had begun and that the "atrocities and brutalizing" of black people by the "oppressive state" would no longer go "unpunished." The note was signed "The Black Revolutionary Army. All power to the people." (J.A. 57; Barclay v. State, 343 So.2d 1266, 1267 (Fla. 1977)).

Several days later Orlando's mother and local radio and television stations received cassette tapes in which the speakers declared that Orlando was the first victim in "the revolution." (T.T. 157, 408-09, 1022). The tapes contained diatribes against "white racist America," listed the historic grievances

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2/ There is some evidence that the note may have been stuck to the body with the knife before it was found. (T.T. 324-25).

of black people, and compared the murder of Orlando to the lynchings and other murders of black people in America. (T.T. 1014-43). The tapes described Orlando's murder, claiming he had begged for mercy "just as black people did when you took them and hung them to the trees, burned their houses down, threw bombs in the same church that practices the same religion that you forced on these people, my people." (T.T. 1019-20). Each tape ended, "Your Black Liberation Army." (T.T. 1021, 1023, 1026, 1031, 1042-43).

Three months later, five young black men, Jacob Dougan, Dwyne Crittendon, Brad Evans, William Hearn and petitioner Elwood Barclay, were arrested for Orlando's murder. All but Hearn were indicted for first degree murder by a grand jury for Duval County, Florida. (R. 5). Hearn was charged by information with second degree murder and allowed to plead guilty to that offense in exchange for his

testimony against the other four. (T.T. 1349). The four were tried together. The jury returned verdicts finding Crittendon and Evans guilty of murder in the second degree, and finding Barclay and Dougan guilty of murder in the first degree. (T.T. 2301-02).[3/] After a penalty trial under Florida's bifurcated sentencing system, the jury recommended that Barclay be sentenced to life but Dougan be sentenced to death. (S.T. 179-80). The trial judge refused to follow the jury's recommendation as to Barclay and sentenced both young men to death. (J.A. 52).

2. The Trial

a. The Guilt Trial

Hearn was the state's key witness at the trial. He testified that he knew the four defendants from a karate class they all attended taught by Dougan. (T.T. 1351). On

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3/ The statute defining first degree murder, Fla. Stat. §782.04, is set forth in the Appendix to this brief, A. 1a-2a.

Sunday, June 16, 1974, Hearn was playing basketball with Crittendon, Evans and Barclay. (T.T. 1352-54). Dougan arrived and asked Hearn if he had his gun with him, because Dougan wanted "to go out and scare some people." (T.T. 1353). Dougan said he was willing to do it by himself, but that it would be better if they all went together. When Hearn asked what it was they were going to do, Dougan said he'd tell them later. (T.T. 1354). He instructed them all to go home and change into dark clothes. (T.T. 1354-55).

The five young men met again at Barclay's house about an hour later, sometime around 8:00 or 8:30 in the evening. (T.T. 1356). Hearn brought a .22 caliber automatic pistol with him, which he gave to Dougan. (T.T. 1356, 1358). Barclay had a "small pocket-knife." (T.T. 1357). The five got into Hearn's two-door car with Hearn driving, Crittendon in the front passenger seat, and the

rest in the back seat. Dougan told them he would instruct them on where to go and what to do. (T.T. 1358, 1381).

After driving for a short time, Dougan instructed Hearn to pull the car to the side of the road under a street light. Hearn did, and Dougan wrote out a note. Dougan read the note to the group and passed it around. Hearn asked again what they were going to do, and Dougan again replied he would tell them later. He told Hearn to drive on, and Heard did so. Dougan continued to direct the route until they arrived at a monument. There Dougan announced that they would "catch a white devil and kill him and leave the note on him." (T.T. 1359-61).

For the next couple of hours, the five drove around Jacksonville, looking unsuccessfully for an isolated person in an isolated area. (T.T. 1363-65). Finally the group headed to Jacksonville Beach, arriving about

10:30 p.m. There they saw Orlando, a young white man, hitchhiking by the side of the road. Hearn stopped the car, and Orlando entered the car and sat between Dougan and Evans in the back seat. (T.T. 1370). The car headed south toward the beach. Orlando told the group his name, and they each told him their names. Orlando asked them if they "smoked reefer" (marijuana). Dougan replied that they did, and asked Orlando if he had any with him. Orlando said he did not, but could get them some from a house on 12th Street. (T.T. 1370). When they got to 12th Street, Dougan told Hearn to drive past the street and keep going straight. Hearn did. (T.T. 1371). Dougan directed the route once again. A police car passed by, and Orlando said, "That pig sure is watching us close." Someone asked him if he disliked police officers, and he replied, "Well, my father's one." Dougan then told Orlando that he was taking him to meet a black girl who could give him some

drugs. (T.T. 1372). As they approached a road, Dougan announced they were getting close to where the girl lived. (T.T. 1377). They turned, then turned again down a dirt road into a wooded area. Dougan told Hearn to stop the car. He did. (T.T. 1380).[4/]

Hearn opened the door on the driver's side and held his seat back but did not leave the car. Crittendon opened the door on the passenger side, got out, and held the seat back. Barclay got out on Hearn's

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4/ The trial judge's original sentencing order stated that Orlando was driven to the scene of the homicide "[a]gainst his will and over his protest" (J.A. 9). This finding was quoted in the opinion of the Florida Supreme Court on Barclay's first appeal. (J.A. 56; Barclay v. State, supra, 343 So.2d at 1267). There is simply no evidence in the record to support such a finding, and the finding does not reappear in the second sentencing order (J.A. 82-141). The only evidence of Orlando's statements or actions during the car ride comes from Hearn's testimony at the trial (T.T. 1370-79), and the entire substance of those statements and actions has been described in our text above. The judge and the prosecutor agreed that Orlando had entered the car voluntarily (T.T. 1913), and the prosecutor acknowledged during his closing argument to the jury that Orlando's first reaction of "protest" occurred after the car stopped and Dougan ordered Orlando to step outside. (T.T. 2026).

side, Dougan on Crittendon's. As Dougan got out he said, "This is it, sucker, get out." Orlando got out behind Dougan and broke to run. (T.T. 1381). Dougan hit Orlando in the back with the gun. Barclay, who apparently had moved around the car, then grabbed Orlando. Evans got out of the car and stood behind Dougan; Orlando was standing between Dougan and Barclay. (T.T. 1384). Hearn watched from the front seat of the car, looking back over his shoulder at the group. (T.T. 1383). He saw Dougan put his hand on Orlando's back and jerk it, throwing Orlando to the ground. Barclay "started stabbing" Orlando, who offered to give them a "bag of reefer." (T.T. 1385). Barclay stabbed Orlando more than once, although Hearn could not say how many times. Dougan told Barclay to move back, and then fired twice. (T.T. 1385). Dougan pulled the gun up, shook it, and tried to fire again but the gun wouldn't go off. (T.T. 1386). Evans

moved up close, went down toward the body a couple of times, and then stood up with the note in his hand. Barclay took the note, went down toward the body with it, and then Evans, Dougan and Barclay returned to the front of the car. (T.T. 1387). The car headed back to Barclay's house. (T.T. 1388).

Hearn next saw the others on Tuesday at the karate class. Dougan told Hearn to bring his car the next day because there was going to be a meeting at the house of another member of the karate class, James Mattison. (T.T 1396). The next evening after the class ended, Hearn, Dougan, Crittendon, Evans, Barclay and three other students from the class (Otis Bess, Edred Black and James Mattison) met at Mattison's house. (T.T. 1397). There Crittendon, Evans, Dougan and Barclay discussed the murder. Dougan had brought a tape recorder and he suggested that everyone present make tapes. No one disagreed. (T.T. 1399). Dougan then wrote

out a script for each person to read into the microphone. (T.T. 1402). Barclay suggested some additions to Dougan's script. (T.T. 1403).

Hearn testified that all the tapes made that night referred to the killing, and that he personally saw Black, Dougan and Barclay making tapes. (T.T. 1399, 1403). He said that although the taped messages depicted Orlando as begging for mercy, Orlando never had. Barclay only added that to "make it seem more aggressive." (T.T. 1403).

Black, Bess and Mattison also testified for the State. Each admitted being present while the tapes were made, and Black and Mattison admitted making tapes themselves, similar in all respects to those made by Barclay and Dougan. (T.T. 949, 977, 1182). The three men each denied any direct knowledge of Orlando's death. Black and Mattison claimed to have made the tapes from a script prepared

by Dougan. (T.T. 990, 996, 1182). They corroborated Hearn's testimony that Dougan was the person who suggested making the tapes, brought the tape recorder, and directed the production of the tapes. (T.T. 938, 950, 958-59, 986, 1155-56, 1160, 1181, 1276, 1283, 1307). Five of the tapes -- only those recorded by Barclay and Dougan -- were introduced into evidence and played for the jury. (T.T. 1009, 1014-43). Black testified to incriminating statements made by Crittendon (T.T. 1159), Evans (T.T. 1159, 1183),[5] Dougan (T.T. 1182) and Barclay (T.T. 1183). Bess corroborated the testimony to some extent. (T.T. 1279, 1281, 1287).

An expert for the State testified that the note found on Orlando's body was written by Dougan. (T.T. 1112). Another testified that a cartridge case found by the body was

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5/ Evans allegedly stated he tried to stick the knife in the victim's chest but it kept folding up. (T.T. 1183).

fired from Hearn's gun. (T.T. 1550).

Crittendon, Dougan, Evans and Barclay each took the stand. Crittendon, Dougan and Barclay admitted having made the tapes, but claimed they did so at Mattison's urging and direction. (T.T. 1608, 1616, 1773, 1782, 1805). All four denied complicity in the homicide. (T.T. 1607, 1609, 1773, 1789, 1817).

After each side had rested, the trial judge called all counsel into chambers to discuss the charges that would be given to the jury before its deliberations on guilt or innocence. It was at first agreed by all counsel and the trial judge that no felony-murder charge would be given because of a lack of any basis in the record for such a charge. (T.T. 1912-13, 1918-19). However, when the court later brought up the possibility of a charge on murder in the third degree -- which is defined in Florida as murder in the course of a felony not enumerated in the first and

second degree felony-murder provisions -- defense counsel decided that they were unwilling to waive a charge on the lesser included offense of murder in the third degree. (T.T. 1924, 1975). The state attorney then insisted that the felony-murder provisions of first and second degree murder be charged as well, to avoid confusing the jury; and the trial judge ultimately agreed. (T.T. 1925, 1975). The jury was subsequently instructed on both premeditated and felony-murder. (T.T. 2230, 2232).

b. The Sentencing Trial

At the sentencing hearing, Dougan produced several witnesses to testify to his good character. (S.T. 59, 61, 64, 66, 70). No additional testimony was presented on Barclay's behalf. The State then brought Hearn back to testify about a second homicide committed by Crittendon and Evans at Dougan's direction, where Hearn once again acted as driver and

observer. (S.T. 90-111). Barclay was in no way implicated in the second homicide, and was unquestionably out of town when it occurred. (S.T. 109-110).

During closing argument, Barclay's attorney informed the jury that Barclay was twenty-three years old, married and the father of five children, had never been convicted of a crime and had no criminal charges pending against him (S.T. 154). He highlighted the disparity in treatment of Hearn, Crittendon and Evans, who all faced punishment for only second degree murder and would be eligible for parole immediately upon their incarceration, while a life sentence for Barclay under the first degree murder statute would make him ineligible for parole until he was forty-eight years old. (S.T. 156). He further noted that Barclay was a follower, not a leader, and that he acted under the domination of another. (S.T. 155).

In its verdict, the jury expressly found that "sufficient aggravating circumstances do not exist to justify a sentence of death; ... [and that] sufficient mitigating circumstances do exist which outweigh any aggravating circumstances," and the jury concluded that life imprisonment was the appropriate punishment for Barclay. (S.T. 180).

The trial judge dismissed the jury and ordered that a presentence investigation report be prepared on each defendant. (S.T. 181). On April 10, 1975, he imposed death sentences on both Barclay and Dougan, despite the jury's verdict of life for Barclay, issuing a single order applicable to both young men. (J.A. 52; see J.A. 1-53).

3. Post-Trial Proceedings

Barclay's and Dougan's automatic appeals to the Florida Supreme Court were heard and decided together. (J.A. 54; Barclay v. State, 343 So.2d 1266 (Fla. 1977).) The court af-

firmed the convictions and death sentences for both, holding that if it did not affirm Barclay's death sentence, "[t]wo co-perpetrators who participated equally in the crime would have disparate sentences...." (J.A. 72; 343 So.2d at 1271). The court did not review each of the trial court's findings of aggravating circumstances applied to Barclay. Instead, it noted the aggravating circumstances found in Dougan's case, held that those findings were "well documented,"[6/] and recited that "[a]s regards Barclay ... virtually the same considerations apply with respect to conse-

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6/ The Florida Supreme Court's description of the trial court's findings is puzzling. It correctly states that the trial judge found no mitigating circumstances as to Dougan, and then lists among the facts pertaining to Dougan that he "had no significant history of prior criminal activity," unquestionably a statutory mitigating factor. (Fla. Stat. §921.141(6)(a) ("the defendant has no significant history of prior criminal activity.") (J.A. 68; 343 So.2d at 1270). In discussing the aggravating circumstances applicable to Dougan, the Florida Supreme Court dropped a footnote describing the aggravating circumstances which the trial judge purportedly did not find; in fact, however, he unambiguously did find two of those. Compare J.A. 34, 35 with J.A. 69; 343 So.2d at 1271 n.3.

quences of the criminal episode." (J.A. 71; 343 So.2d at 1271). The court did not discuss the factual basis for those aggravating circumstances found by the trial court in Barclay's case which are directed toward the character of the defendant rather than the circumstances of the offense, Fla. Stat. §921.141(5)(a) ("The capital felony was committed by a person under sentence of imprisonment"), and Fla. Stat. §921.141(5)(b) ("The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person"). Both of those factors are at issue in the present proceeding.

The Supreme Court of Florida subsequently vacated the death sentences imposed on both Barclay and Dougan in light of this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), since there was a possibility that the trial court had relied on a presentence investigation report which the defendants had had no

opportunity to rebut, deny or explain.

New counsel was appointed for Barclay, and a resentencing hearing was held in three parts on June 23, 1979, October 23, 1979 and April 18, 1980, before the trial judge who had imposed the death sentence originally. A law enforcement officer who had investigated the case was called by the defense (R.T. 4), and testified that Dougan was the leader of the group (R.T. 20-21), although Barclay was "second in command" (R.T. 24) because he was older and smarter than Crittendon, Evans and Hearn. (R.T. 28). Counsel for Barclay argued that the trial judge's original sentencing order contained a number of errors, including the finding of a nonstatutory aggravating circumstance and the overbroad interpretation of several statutory aggravating circumstances. (R.T. 56-94). The trial judge reimposed the death sentence. (R.T. 128). His new sentencing order was a virtual duplication of his original order, different only in the

omission of a few findings that he had made earlier, principally those findings relating to Dougan, whose resentencing had been separately conducted. (J.A. 89).7/

Once again the Florida Supreme Court affirmed on appeal, this time with no analysis at all of the trial judge's order. (J.A. 142-45; Barclay v. State, 411 So.2d 1310 (Fla. 1981)). The court deemed all sentencing issues other than those concerning conformity with its Gardner remand order to have been decided by the original appeal. (J.A. 144-45). Rehearing was denied on a three-to-three vote

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7/ The Florida death-sentencing statute, Fla. Stat. §921.141 (Supp. 1976-1977) was amended in 1979 to clarify that mitigating circumstances are not limited to those in the statute, and to add an aggravating circumstance ("The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification"). See Fla. Stat. §921.141(5)(i)(Supp. 1982). The jury recommended life and the judge sentenced Barclay to death under the older version of the statute. On resentencing in 1980, the trial judge appears to have used the older version as well, because his recitation of the aggravating circumstances considered did not include Fla. Stat. §921.141-(5)(i). See Sentencing Order, J.A. 134.

of the Justices. (J.A. 146).[8] This proceeding on certiorari followed.

SUMMARY OF ARGUMENT

Elwood Barclay's death sentence was imposed through procedures bearing scant resemblance to those which this Court approved in Proffitt v. Florida, 428 U.S. 242, 251 (1976) (opinion of Justices Stewart, Powell and Stevens), as appearing "[o]n their face ... to meet the constitutional deficiencies identified in Furman [v. Georgia, 408 U.S. 238 (1972)]."

In Part I(A) below, we show that Barclay's trial judge overrode a jury recommendation of life and sentenced Barclay to die on the basis of (1) factors not included in the list of "statutory aggravating circumstances," Proffitt v. Florida, supra, 428 U.S. at 250,

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8/ Of the nine justices in the two appeals, four dissented from the affirmance of the death sentence, and a fifth (who had not heard either appeal) would have voted for rehearing of the decision affirming the sentence after the Gardner remand.

which are supposed to give "specific and detailed guidance" to the capital sentencing decision, id. at 253; (2) factors found only by distorting the statutory aggravating circumstances beyond recognition, so as to nullify their effect as guarantors of even minimal "consistency in the imposition [of the death penalty] at the trial court level," id. at 252; and (3) factors not "focus[ed] on the circumstances of the crime and the character of the individual defendant," id. at 251. In Part I(B), we demonstrate that this sentencing procedure was unconstitutional, as the very antithesis of "an informed, focused, guided, and objective inquiry into the question whether [Barclay] ... should be sentenced to death," id. at 259.

In Part II below, we show that the affirmance of the resulting death sentence by the Florida Supreme Court violated every

precept of a system of appellate review in which the "reasons [for a death sentence], and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law," id. at 259-60. Part II proceeds by (A) describing the rules of Elledge v. State, 346 So.2d 998 (Fla. 1977), which purport to define the circumstances under which lawless findings of aggravating circumstances require reversal of a death sentence by the Florida Supreme Court; (B) showing that Barclay's death sentence must be reversed under any consistent and evenhanded administration of the Elledge rules; and (C) showing that, insofar as the Elledge rules do not require the reversal of Barclay's death sentence, they cannot be squared with Due Process or the Eighth Amendment.

ARGUMENT

I. BARCLAY'S DEATH SENTENCE WAS THE PRODUCT OF A CAPRICIOUS SENTENCING PROCESS, FLOUTING THE SAFEGUARDS WHICH PROFFITT RELIED UPON TO ASSURE AGAINST ARBITRARINESS IN DEALING OUT THE DEATH PENALTY

A. Barclay's Death Sentence Rests Preponderately Upon Lawless Findings and Considerations Not Channelled By The Florida Capital Sentencing Statute

This Court is familiar with the manner in which the Florida death-penalty statute is supposed to work. First, an advisory jury "is directed to consider '[w]hether sufficient mitigating circumstances exist ... which outweigh the aggravating circumstances found to exist; and ... [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.'" Proffitt v. Florida, supra, 428 U.S. at 248. The sentencing judge is supposed to follow a jury's recommendation of life unless "'the facts suggesting a sentence of death

[are] ... so clear and convincing that virtually no reasonable person could differ.'" Id. at 249. The facts governing this latter decision are required to be set forth in writing, following a process in which the trial "judge is also directed to weigh the statutory aggravating and mitigating circumstances . . . ." Id. at 250.

Since Barclay's jury recommended life -- explicitly finding that "sufficient mitigating circumstances do exist which outweigh any aggravating circumstances" (S.T. 180) -- the crux of the present case is the set of findings upon which the trial judge relied to override the jury's recommendation and impose a death sentence. We turn immediately to these, and show that they include (1) findings of nonstatutory aggravating circumstances, (2) lawless findings of statutory aggravating circumstances,

and (3) findings relating to the judge's World War II experiences.

1. Findings of nonstatutory aggravating circumstances

a. Prior criminal activity

Fla. Stat. §921.141(6)(a) makes it a mitigating circumstance that "[t]he defendant has no significant history of prior criminal activity." The statute does not conversely make the presence of a significant history of prior criminal activity an aggravating circumstance. See Fla. Stat. §921.141(5); e.g., Maggard v. State, 399 So.2d 973, 977-78 (Fla. 1981). Nevertheless, Barclay's trial judge, the Honorable R. Hudson Olliff, made the following sentencing finding:

> "A. WHETHER DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY
>
> FACT:
>
> The defendant, Barclay, has an extensive criminal record of seven prior arrests. It shows that he had previously been on

> probation for the crime of uttering a forgery, and that subsequently that probation was revoked and he was sentenced to a term of six months County Jail. It also shows that he had previously been on five years probation for the crime of Breaking and Entering and Grand Larceny. There are also a number of misdemeanor crimes charged. (See PSI)
>
> CONCLUSION:
>
> There is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record showing at least one prior felony conviction and one prior felony probation."

(J.A. 108-09).

Lest there be any doubt that the absence of the mitigating circumstance defined by §921.141(6)(a) is not "an aggravating ... circumstance," the Florida Supreme Court explicitly so held in Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). Barclay's counsel called Mikenas to Judge Olliff's attention (R.T. 61), to no avail. In addition, the Florida Supreme Court has repeatedly held

that, even as to prior convictions of violent felonies, which do constitute proper statutory aggravating circumstances under Fla. Stat. §921.141(5)(b) [see pages 37-38 infra], "mere arrests" do not qualify as convictions, Provence v. State, 337 So.2d 783, 786 (Fla. 1976), and any "charge [which has] ... not resulted in a conviction at the time of the [capital] trial" must be considered an improper "nonstatutory aggravating factor," Elledge v. State, supra, 346 So.2d at 1002.9/ If a defendant does have prior violent felony convictions, these must be proved by "evidence, either at trial or during the sentencing phase," in order to warrant their consideration as a statutory aggravating factor within §921.141(5)(b); their consideration "based solely on information contained in the

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9/ We shall see in note 24 and accompanying text infra, that the Florida Supreme Court itself has now clearly taken the position that consideration of nonstatutory aggravating circumstances as the basis for a death sentence is improper.

presentence investigation report" is forbidden. Williams v. State, 386 So.2d 538, 542-43 (Fla. 1980). Thus, on three distinct and unmistakable counts, Judge Olliff's finding that "[t]here is an aggravating, rather than a mitigating circumstance as to the defendant Barclay because of his extensive record" (J.A. 108) falls outside the contemplation of any statutory aggravating circumstance recognized by Florida law.

b. "Under sentence of imprisonment" and previous conviction of a violent felony

Two additional aggravating circumstances found by Judge Olliff should probably be classified as nonstatutory, since his own discussion of them negates their statutory elements. In each case, his findings follow an identical logic: The statutory aggravating circumstances do not exist [or have not been proved] factually; however, the facts show something resembling them; therefore, an

aggravating circumstance is found. Because these two findings do have some connection -- albeit no lawful connection -- to statutory aggravating factors, we consider them in the following section. They are items (2)(a) and (b), immediately below.

2. Lawless findings of statutory aggravating circumstances

a. Under sentence of imprisonment

Fla. Stat. §921.141(5)(a) makes it an aggravating circumstance that "[t]he capital felony was committed by a person under sentence of imprisonment." Judge Olliff found:

> "A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE HAS BEEN CONVICTED
>
> FACT:
>
> The defendant, Barclay, was not under sentence of imprisonment at the time of the commission of this murder. His rap sheet shows seven prior arrests and he had previously been convicted of a felony and had been on felony probation.

CONCLUSION:

Although not imprisoned, the criminal record of Barclay is an aggravating circumstance."

(J.A. 120-21).

Like the fact that Barclay "had previously been convicted of a felony," the fact that he "had been on felony probation" was a thing of the past. Barclay was not on probation at the time of the present offense. Even if he were, the "under sentence of imprisonment" aggravating circumstance of §921.141(5)(a) would plainly not apply, since the Florida Supreme Court has construed the statute as meaning exactly what it says. To come within §921.141(5)(a), a defendant must be "under sentence of imprisonment" at the time of the capital felony, not under sentence of probation. E.g., Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982); Peek v. State, 395 So.2d 492, 499 (Fla. 1981). Where, as Judge Olliff found here, a defendant "was not under

sentence of imprisonment at the time of the commission of his murder," no amount of cy pres reasoning can make his "criminal record ... an aggravating circumstance" (J.A. 121), as Judge Olliff then went on to find.10/ See Ford v. State, 374 So.2d 496, 501 n.1, 502 (Fla. 1979).

10/ Judge Olliff has sentenced five defendants to death, overriding a jury recommendation of life in four of the five cases. One of the four defendants in whose cases Judge Olliff ignored a jury's life recommendation committed suicide on death row before his appeal could be heard. Carnes v. State, No. 74-2024, 74-2131, Cir. Ct. 4th Jud. Cir., Duval County, Florida (Nov. 19, 1974); Miami Herald, July 4, 1975, at 9-A. One case was reversed by the Florida Supreme Court because of improper consideration of aggravating circumstances. Lewis v. State, 398 So.2d 432 (Fla. 1981). Two were affirmed. Barclay v. State, supra; Dobbert v. State, 375 So.2d 1069 (Fla. 1979).

Judge Olliff found the "under sentence of imprisonment" aggravating circumstance to be applicable in each of the five cases in which he imposed a death sentence, although it could properly be applied in only one of those five. Lewis v. State, supra, 398 So.2d at 438. In Dougan v. State, 398 So.2d 439, 441 (Fla. 1981) (McDonald, J., dissenting), Judge Olliff found that although Dougan was not under sentence of imprisonment, he had once been convicted of criminal contempt, and the aggravating circumstance therefore applied. In Dobbert v. State, supra, 375 So.2d at 1071, Judge Olliff found that although Dobbert was not under sentence of imprisonment, he had prevented his own imprisonment for child

b. Previous conviction of a violent felony

Fla. Stat. §921.141(5)(b) makes it an aggravating circumstance that "[t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Judge Olliff found:

"B. WHETHER THE DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON

FACT:

The defendant, Barclay, was previously convicted of breaking and entering with intent to commit the felonv of grand larceny. It is not known if such prior felony

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10/ (continued)

abuse by intimidating his victims and deceiving the authorities, and he had been convicted twice in the past. In Carnes v. State, supra, Judge Olliff found that although Carnes was not under sentence of imprisonment, he was out on bond on another charge at the time of the offense and therefore the aggravating cirucumstance applied. (A. 29a).

> involved the use or threat of violence in the crime. However, such crime can and often does involve violence or threat of violence - if there is a person in the building broken into.
>
> CONCLUSION:
>
> This is more of an aggravating than a negative circumstance."

(J.A. 121-22).

Once again, this cy pres finding of an aggravating circumstance is wholly lawless. The Florida Supreme Court has held that the aggravating circumstance defined by §921.141-(5)(b) also means what it says: only capital felonies or felonies which by definition involve the use or threat of violence (such as armed robbery) may be used in aggravation, unless there is proof beyond a reasonable doubt that the offense underlying the prior conviction actually involved the use or threat of violence. See, e.g., Mann v. State, 420 So.2d 578, 580 (Fla. 1982) (burglary convic-

tion may not be used as an aggravating factor); Spaziano v. State, 393 So.2d 1119, 1122-23 (Fla. 1981) ("nonviolent felony" conviction "must be excluded as [an] aggravating factor[]"); Ford v. State, supra, 374 So.2d at 501 n.1, 502 (conviction of breaking and entering to commit a felony may not be used as an aggravating factor). In Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), the Florida Supreme Court expressly found that "two convictions of breaking and entering with intent to commit a felony" did not fall "within the meaning of this aggravating circumstance as defined by the statute," because the statute "refers to life-threatening crimes in which the perpetrator comes in direct contact with a human victim." Moreover, as we have noted at pages 31-32, supra, even if Barclay's prior breaking-and-entering offense had involved "the use or threat of violence in the crime" -- facts which Judge

Olliff conceded were "not known" (J.A. 121), i.e., unproved despite the State's obligation to prove the elements of every aggravating circumstance beyond a reasonable doubt, Williams v. State, supra, 386 So.2d at 542 -- Judge Olliff could not properly have found an aggravating circumstance under §921.141(5)(b) based upon the PSI alone, as he purported to do here.[11] Williams v. State, supra, 386 So.2d at 543.[12]

11/ Again, Judge Olliff found this aggravating circumstance to be present in all but one of the cases in which he sentenced a defendant to death. He found it applicable in Dougan v. State, supra, 398 So.2d at 441, although Dougan's only prior record involved a criminal contempt conviction with no evidence of violence. He found it applicable in Lewis v. State, supra, 398 So.2d at 438, although Lewis' prior record consisted of two breaking and enterings with intent to commit a felony, two escapes, one grand larceny, and one possession of a firearm by a convicted felon. (A. 49a-50a). The Florida Supreme Court disapproved the finding in Lewis, as noted on page 38, supra. Judge Olliff found it applicable in Carnes v. State, supra, although Carnes had never been convicted of any offense, but had been charged with a felony involving violence. (A. 30a). The Florida Supreme Court has held that charges not reduced to a conviction may not be used in aggravation. See page 31 supra.

12/ Compliance with the requirement of Williams would not have been superfluous in this case. The PSI relied

c. Great risk of death to many persons

Fla. Stat. §921.141(5)(c) makes it an aggravating circumstance that "[t]he defendant knowingly created a great risk of death to many persons." Recognizing the need to give this statutory aggravating circumstance a limiting construction which would assure some measure of consistency in its application, see Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979), the Florida Supreme Court has interpreted it to require (1) that the risk of death created be to "many" people, not just to one or two,[13] and (2) that there must be something in the

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12/ (continued)

upon by Judge Olliff to establish Barclay's record contains two different versions of that record, and a comparison of the two produces only confusion as to the actual number and nature of Barclay's encounters with the law. (A. 77a-79a).

13/ Blair v. State, 406 So.2d 1103, 1107-08, (Fla. 1981) (victim alone with defendant in house, child outside mowing lawn; held, "one or two" is not "many" persons); Odom v. State, 403 So.2d 936, 942 (Fla. 1981) (two women present with victim in house when defendant and accomplice fired shotguns through window; held, not

nature of the homicidal act itself (as in arson or the use of explosives), or in the defendant's conduct immediately surrounding the homicidal act, which created such a risk.[14]

13/ (continued)

"many" persons); Lewis (Robert) v. State, supra, 398 So.2d at 438 (same; Odom's accomplice); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981)("Although the shooting occurred in a rest area close to a major highway, it was done with pistols at close range where few, not many, suffered a risk of injury"); Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1981) ("gun battle" in pharmacy, three other people present; held, not "many" persons); Williams v. State, supra, 386 So.2d at 541-42 (two people shot in bed; held, not "many" persons); Brown v. State, 381 So.2d 690, 696 (Fla. 1980) (robbery of shop, no indication of number of persons present; held, no proof that "many" persons were endangered); Lewis (Enoch) v. State, 377 So.2d 640, 646 (Fla. 1979) (victim's son and daughter in yard with victim when several shots were fired; held, not "many" persons); Dobbert v. State, supra, 375 So.2d at 1070 (defendant killed one child, physically abused three other children; held, not "many" persons); Kampff v. State, supra, 371 So.2d at 1009-10 (defendant fired five shots at victim in heavily traveled retail bakery where two others were present; held, not "many" persons).

14/ Bolender v. State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 490, 491 (No. 59,333) (Oct. 28, 1982) (other people present at scene of homicide, but defendant "never directed his actions toward any of the uninvolved people, and the means by which he inflicted the injuries, the gun, knife and baseball bat, were not used to endanger the lives of those individuals"); Ferguson v. State, 417 So.2d 639, 643, 645 (Fla. 1982) (eight people in house, each shot by defendant or accomplice

14/ (continued)

while bound, all but two killed; each homicide committed without risk to others; held, aggravating circumstance inapplicable); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981) ("attempting to run a roadblock and being stopped by police gunfire does not constitute 'great risk' to 'many persons' as we defined those terms in Kampff"); Mines v. State, 390 So.2d 332, 337 (Fla. 1980) (defendant killed victim in van, then stopped passing motorist whom he hit with a machete; he fled in the car at high speed, took another woman hostage; finding of "great risk" vacated because only conduct surrounding the homicide of the victim, not after-occurring acts, may provide the basis for "great risk"); Dobbert v. State, supra, 375 So.2d at 1070 (murder by strangulation did not create "great risk" of death to others despite defendant's violent abuse of his several children at other times); Elledge v. State, supra, 346 So.2d at 1004 (defendant committed another homicide in another city after the victim was killed; "[i]t is only conduct surrounding the capital felony for which the defendant is being sentenced which properly may be considered" as a basis for a finding of "great risk").

We must acknowledge that this aggravating circumstance has been found in a handful of cases in which the standards enunciated by the Florida Supreme Court have not been followed. Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) ("raging gun battle" but only three people present); Ford v. State, supra, 374 So.2d at 497, 500-02 n.1 (defendant threatened victims of robbery with gun; drove at high speeds creating a risk to others on the road) (compare with Tafero v. State, supra); Huckaby v. State, 343 So.2d 29 (Fla. 1977) (defendant convicted of sexual battery of a child, "sincere threats on the lives of his nine children and wife over the

Judge Olliff based his finding of the "great risk" aggravating circumstance[15] on

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14/ (continued)

course of many years" often resulting in actual harm considered sufficient (compare with Dobbert v. State, supra); Alvord v. State, 322 So.2d 533, 535 (Fla. 1975) (defendant murdered three woman by strangulation). In another small number of cases the Florida Supreme Court neither approved nor disapproved the finding of "great risk" by the trial court. Most of these cases were reversed on other grounds. Mikenas v. State, 367 So.2d 606 (Fla. 1978) (shoot-out during robbery of convenience store, number of people present not indicated; reversed because of consideration of nonstatutory aggravating circumstances); Washington v. State, 362 So.2d 658, 660, 663 (Fla. 1978) (four victims of robbery shot at close range while bound, one killed; death sentence affirmed); McCaskill & Williams v. State, 344 So.2d 1276, 1277, 1280 (Fla. 1977) (thirty-five to forty people in liquor store during hold-up, gun battle outside store as participants fled; death sentences reversed because jury recommendation of life was reasonable); Slater v. State, 316 So.2d 539, 540, 542 (Fla. 1975) (only one victim present, but threat existed to "any unknown persons who might have chanced into the office;" death sentence reversed because jury recommendation of life was reasonable); Proffitt v. State, 315 So.2d 460, 461, 467 (Fla. 1975) aff'd sub nom. Proffitt v. Florida, 428 U.S. 242 (1976) (victim in bed stabbed once in chest; wife sleeping beside him was pushed down by intruder when she awoke; death sentence affirmed).

15/ Yet again, Judge Olliff found this aggravating circumstance to be present in every case in which he imposed a death sentence. The finding was vacated by the Florida Supreme Court in both Lewis v. State,

the fact that the defendants passed over several other people before Orlando was selected as the victim (J.A. 122-23), and on the potential danger created by the "call for revolution and racial war" contained in the tapes sent to the news media several days after the homicide. (J.A. 123-24). Neither of these features of the case brings it properly within the Florida Supreme Court's usual construction of the aggravating circumstance:

(i) The fact that the defendants may have passed by and rejected other victims before finding and killing Orlando does not establish that Orlando's murder was committed

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15/ (continued)

supra, 398 So.2d at 438 and Dobbert v. State, supra, 398 So.2d at 1070. (See n.13 supra.) In Carnes v. State, supra, there were two people present in the house, although in another room, when the defendant shot the victim. (A. 13a-14a). Judge Olliff found the aggravating circumstance to be applicable because of the defendant's mistreatment of the two other people after the homicide was completed. (A. 31a-33a).

in such a fashion as to create a great risk of death to many persons. Dougan and his confederates set out to kill one person; they searched until they found one alone; they took him to a still lonelier spot, where he was the only person present in addition to the confederates at the time of the killing. To find that the 'casing' of other victims elsewhere prior to the homicide makes this aggravating circumstance applicable would be to find that every robber who passes several stores, every rapist who walks the street looking for a victim, has, by his very decision to avoid the presence of other people, created a "great risk of death to many people." If this reasoning were allowed, there would simply be "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Florida, 446 U.S. 420, 433 (1980) (plurality opinion).

(ii) Reliance on the "call to revolution" fares no better. It violates both the principle that behavior subsequent to the homicide (here the production of the tape recordings) cannot be considered as establishing the "great risk" aggravating circumstance, see note 14 supra, and the principle "that a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance." White v. State, 403 So.2d 331, 337 (Fla. 1981) (emphasis in original).

We recognize that the Florida Supreme Court affirmed the finding of this aggravating circumstance in its opinion on the first of Barclay's two appeals. (J.A. 70; Barclay v. State, supra, 343 So.2d at 1271 n.4). In doing so, however, it made no effort to rationalize the finding by any logic which would render it consistent with the substantial body

of the court's own decisions that have interpreted the "great risk" statutory circumstance in a way which would make it inapplicable here. See notes 13 and 14 supra. The conclusionary statement that the finding is "well documented in the record before us," (J.A. 70; Barclay v. State, supra, 343 So.2d at 1271) therefore brings the case to this Court in a posture identical to Godfrey v. Georgia, supra, 446 U.S. at 432, where "the State Supreme Court [had] simply asserted that the verdict was 'factually substantiated,'" although not by any consistent reasoning that this Court could discern. What this implies at best is that the Florida Supreme Court itself has here -- and perhaps in some other cases as well, see the second paragraph of note 14 supra -- failed to observe with regularity its own professed interpretations of Fla. Stat. §921.141(5)(c). See also notes 16 and 17 infra. If these

failures can be taken together with their opposites as constituting the law of Florida, then Judge Olliff's finding of the "great risk" circumstance in Barclay's case was not indeed "lawless" in the sense of departing from the law; it was "lawless" in the more fundamental sense of lacking any law to follow or depart from.

d. Murder committed during a kidnapping

Fla. Stat. §921.141(5)(d) makes it an aggravating circumstance that "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of ... any ... kidnapping ...." Judge Olliff found this aggravating circumstance (J.A. 125-27); and, at first blush, it might well seem to apply to the facts as he sets them forth. There are, however, two problems with this finding. First, the facts as related by Judge Olliff are nowhere to be found in the record. Second, the judge himself ruled

in the first instance that there was insufficient evidence of a kidnapping in this case.

Judge Olliff recites in his sentencing findings that the defendants "by force and/or threats kept [Orlando] ... in their car until they found an appropriate place for the murder." (J.A. 126). But the only witness who testified about the circumstances of the car ride, William Hearn, said that Orlando got in the car voluntarily, joked and exchanged pleasantries, and rode with the defendants without any threat or force being used. (T.T. 1369-72). There is no evidence that he protested in the slightest when Dougan ordered Hearn to pass the street which Orlando had designated as the one where they could buy some marijuana, and instead to proceed to another place where they could get drugs from a black woman. It was only when Dougan told Orlando to get out of the car at the site of the homicide that Orlando first indicated any

unwillingness to accompany the occupants of the car in which he had hitched a ride.

More importantly, Judge Olliff himself deemed the evidence insufficient to establish a kidnapping. During the charge conference at the close of the trial on guilt, all counsel and the trial judge agreed that the felony-murder provisions of the first and second degree murder statutes which included kidnapping as one of the predicate felonies would not be read to the jury because they were not applicable on the facts proved at trial. (T.T. 1912-1913, 1918-19). A felony-murder instruction was eventually given only because counsel for the defendants refused to waive an instruction on the lesser offense of third degree murder (murder during the course of a nonenumerated felony) (T.T. 1924-1975), and the instruction would be too confusing and incomprehensible unless the jury had received instructions on first and second

degree felony-murder spelling out the enumerated felonies. (T.T. 1925, 1975).

e. Murder committed to disrupt a governmental function, and "especially heinous, atrocious or cruel"

The two remaining aggravating circumstances found by Judge Olliff pose considerably greater difficulty in analysis, the first (that "the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws," Fla. Stat. §921.141(5)(g)) because the Florida Supreme Court has said so little about it that no clear standards emerge;[16/]

16/ The "hinder law enforcement" aggravating circumstance has been found by the trial court in twenty-five cases reviewed by the Florida Supreme Court on appeal. In all but eleven of the cases, the circumstance was applied to a factual situation in which a victim or bystander witness of a felony was then killed by the felon, apparently to avoid prosecution for the underlying felony. See Gilven v. State, 418 So.2d 996, 1000 (Fla. 1982); Ferguson v. State, 417 So.2d 639, 642-43 (Fla. 1982); Jones v. State, 411 So.2d 165, 168 (Fla. 1982); Smith v. State, 407 So.2d 894, 903 (Fla. 1981); Francois v. State, 407 So.2d 885, 890 (Fla. 1981); Blair v. State, 406 So.2d 1103, 1108-09 (Fla. 1981);

the second (that the offense was "especially

16/ (continued)

White v. State, 403 So.2d 331, 337-38 (Fla. 1981); Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981); Zeigler v. State, 402 So.2d 365, 376 (Fla. 1981); Williams v. State, supra, 386 So.2d at 541, 543; Clark v. State, 379 So.2d 97, 107 (Fla. 1979); Washington v. State, 362 So.2d 658, 665-66 (Fla. 1978); Meeks v. State, 339 So.2d 186, 190 (Fla. 1976); Meeks v. State, 336 So.2d 1142, 1143 (Fla. 1976). In six of the cases, the defendant killed a police officer, apparently to avoid arrest for another offense. Tafero v. State, 403 So.2d 355, 362 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 715-16, (Fla. 1981); Holmes v. State, 374 So.2d 944, 945-46 (Fla. 1979); Ford v. State, supra, 374 So.2d at 497; Songer v. State, 365 So.2d 696, 698-99 n.2 (Fla. 1978); Raulerson v. State, 358 So.2d 826, 828 (Fla. 1978). In three cases the victim was a police informant, or slated to be a witness in a judicial proceeding against the defendant or his associates. Bolender v. State, _____ So.2d ____, 1982 Fla. Law Wkly, SCO 490 (No. 59,333) (Oct. 28, 1982); White v. State, 415 So.2d 719, 720 n.2 (Fla. 1982); Antone v. State, 382 So.2d 1205, 1208-09 (Fla. 1980). The remaining two cases are those of Barclay and Dougan, where the circumstance was based on the defendants' "call for revolution."

The Florida Supreme Court has often questioned the applicability of the "hinder law enforcement" aggravating circumstance to a particular case because of doubts whether the evidence was adequate to show that the defendant killed the victim to avoid arrest, rather than for some other reason. It has never vacated a finding of "hinder law enforcement," however, except to correct its use as an additional factor when the reasons for applying it were counted separately against the defendant under the "avoid arrest" aggravating circumstance, Fla. Stat. §921.141 (5)(e).

heinous, atrocious or cruel," Fla. Stat. §921.141(5)(h)) because the Florida Supreme Court has made so many contradictory statements about it that no clear standards emerge.[17] The dissenting justices in Dougan

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17/ The "especially heinous, atrocious or cruel" aggravating circumstance has generated a welter of unintelligible law. The Florida Supreme Court has vacated many findings of "especially heinous, atrocious or cruel", but it has also approved the finding in circumstances which seem factually indistinguishable. The narrowing construction given §921.141(5)(h) in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), and approved by this Court in Proffitt v. Florida, supra, 428 U.S. at 255-56, does not seem to have assisted in ensuring a consistent application of the circumstance.

The Florida Supreme Court has had no problem in cases where the victim was physically tortured, e.g., Gardner v. State, 313 So.2d 675 (Fla. 1975)(victim sustained over one hundred bruises, and injuries including genital mutilation); where death was caused by strangulation, e.g., Adams v. State, 412 So.2d 850 (Fla. 1982); or where a female victim was sexually assaulted before being murdered, e.g., Hitchcock v. State, 413 So.2d 741 (Fla. 1982). However, in a variety of other situations, too numerous to catalogue here, the Florida Supreme Court's results are not so comprehensible or consistent. A few examples relating to the grounds for the §921.141(5)(h) finding in Barclay's case will suffice to make the point.

Judge Olliff based his finding that the killing was "especially heinous, atrocious or cruel" on (1) the fact that the murder was premeditated and the victim was stalked, (2) the fact that the murder was motivated

17/ (continued)

by a desire for revolution and (3) the facts that the victim was "repeatedly stabbed by Barclay as he writhed in pain begging for mercy. Then Dougan shot him twice in the head." (J.A. 132-34).

The fact that the murder was premeditated exists, of course, in every case where a defendant is convicted of first degree murder on a theory of premeditation. Premeditation is one of the two grounds of liability for first degree murder in Florida, see Fla. Stat. §782.04-(1)(a); the other — felony murder — almost invariably triggers the separate aggravating circumstance defined by Fla. Stat. §921. 141(5)(d). If premeditation alone serves to make a murder "especially heinous, atrocious or cruel," then there are virtually no first degree murders which are not eo ipso candidates for the death penalty under either §921.141(5)(h) or (5)(d). Yet the Florida Supreme Court has persistently come out both ways on the question whether premeditation suffices under subsection (5)(h). Compare Harvard v. State, 414 So.2d 1032, 1033, 1036 (Fla. 1982) (defendant "stalked" and harassed ex-wife after their separation; homicide itself was committed by a single shotgun blast at ex-wife while she was in a car, death was instantaneous, with no evidence that she was aware of danger when killed; trial court's finding of "heinous, atrocious or cruel" circumstance based on fact that the crime was premeditated, calculated and "a cold-blooded execution" upheld) with Kampff v. State, supra, 371 So.2d at 1008, 1010 (defendant and wife were separated three years; defendant harassed her throughout the period; the homicide was committed by five shots at victim in a store, three of which struck and killed her; held, "heinous, atrocious or cruel" circumstance was not applicable). Compare Vaught v. State, 410 So.2d 147, 148, 151 (Fla. 1982) (robbery victim exposed defendant's face, defendant shot him five times; held, "heinous, atrocious or cruel" circumstance was applicable because

17/ (continued)

the murder was "inflicted in a cold, calculating, or 'execution-style' fashion") with Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979) (robbery victim shot twice while arms were raised in submissive position; held, "there is nothing to set this execution murder 'apart from the norm of capital felonies'"). Compare McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982) (defendant, angered by victim's actions during robbery, approached him and said, "This is for you motherf---er", then shot him three times; held, "heinous, atrocious or cruel" circumstance was not applicable); with Johnson v. State, 393 So.2d 1069, 1071, 1073, 1074 (Fla. 1980) (defendant, angered by fact that victim had shot at him during robbery, walked up to victim when victim ran out of bullets and said, "You think you're a smart son-of-a-bitch, don't you?" then shot him once in the chest; held, "heinous, atrocious or cruel" applicable to this "execution murder.")

There are no cases with which to compare Judge Olliff's second reason for finding the "heinous, atrocious, or cruel" circumstance in Barclay, i.e., the call for "revolution." However, this motive for a murder would seem irrelevant to the stated issue whether "the actual commission of the capital felony was ... [a] conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, supra, 283 So.2d at 9.

Judge Olliff's third reason, the stabbing and shooting of the victim, comes closer to the Dixon definition of "especially heinous, atrocious or cruel," but here again there are problems. One is that Judge Olliff's description of the homicide contradicts that given by the only eyewitness who testified, Hearn (see pages 49-50 supra), drawing instead upon the tapes, which Hearn said were exaggerated for propaganda purposes (T.T. 1403). While in an ordinary case the

17/ (continued)

resolution of such a "factual dispute" -- if it can be described as such — would, of course, be left to the trial judge, here there was another finder of fact involved, the jury; and the jury took a view of the facts that led it to recommend life for Barclay. Thus, under Florida law as the Florida Supreme Court has repeatedly declared it, Judge Olliff's findings of "facts suggesting a sentence of death" were required to be "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). See, e.g., Gilvin v. State, supra, 418 So.2d at 999; Williams v. State, supra, 386 So.2d at 543, and cases cited. In any event, even if the events surrounding the homicide are taken to be as they are described in Judge Olliff's sentencing order, it is far from clear that they would support a finding of an "especially heinous, atrocious or cruel" murder, consistently with the Florida Supreme Court's application of that statutory circumstance in numerous other cases than Barclay's. In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the victim was beaten to death with a nineteen inch breaker bar. The Florida Supreme Court saw "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Id. at 561. In Simmons v. State, 419 So.2d 316, 318-19 (Fla. 1982), the victim was bludgeoned to death with a roofing hatchet. The Florida Supreme Court vacated a finding that the offense was "especially heinous, atrocious or cruel." In Demps v. State, 395 So.2d 501, 503, 504, 506 (Fla. 1982), the victim died from multiple stab wounds, and lived for several hours before succumbing. Held: not "especially heinous, atrocious or cruel." In Lewis v. State, 377 So.2d 640, 646 (Fla. 1979), the victim was shot several times in the chest and back while trying to flee from the defendant. Held: not "especially heinous, atrocious or cruel." In Riley v. State, 366 So.2d 19,

v. State, 398 So.2d 439, 441 (Fla. 1981), believed the first to be inapplicable to the case, and the second to be applicable. We will dwell on neither here, because Elwood Barclay's death sentence must be vacated whether they were properly found or not. (See pages 83-107 infra.) We do not concede, however, the applicability of either circum-

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17/ (continued)

20, 21 (Fla. 1978), the owner of a store, his son, and the manager of the store were bound, gagged and shot in the head by the defendant. One survived. Held: not "especially heinous, atrocious or cruel." In Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), the victim was allowed to "languish, without assistance or the ability to obtain assistance." Held: not "especially heinous, atrocious or cruel." Nothing in the stabbing or shooting of Stephen Orlando serves to distinguish these cases.

A final comment on Judge Olliff's finding of the §921.141(5)(h) circumstance is in order. Judge Olliff has found each of the cases in which he sentenced a man to death to be an "especially heinous, atrocious or cruel" crime. In each he described his years of experience in criminal justice, and his experiences on the battlefields of World War II. In each he pronounced that although, because of those experiences he was not easily shocked, the offense before him shocked him. (See J.A. 50-51, 137-39; A. 40a-41a, 74a-75a; Dobbert v. Florida, 432 U.S. 282, 296 n.9 (1977)).

stance, or the sufficiency of the Florida Supreme Court's interpretation and application of either circumstance to satisfy this Court's concern against "standards so vague that they would fail adequately to channel ... sentencing decision patterns ... with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur," Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976); see Godfrey v. Georgia, supra, 446 U.S. at 428.

3. An additional nonstatutory aggravating circumstance, and its relationship to Judge Olliff's personal experience

Judge Olliff did not rest his sentence of death for Elwood Barclay solely upon the aggravating circumstances discussed above. No fair reading of his sentencing findings can escape the conclusion that he sentenced Barclay to die in large measure because of his personal abhorrence for the

motive which prompted the killing of Stephen Orlando: racial hatred. Although the fact that this killing was racially motivated might certainly have been considered as a proper aggravating circumstance under a statute making it one (cf. Cal. Penal Code §190.2-(a)(16)), the plain fact is that the Florida legislature chose not to include such a circumstance in its statutory scheme. Under that statute, by which Florida sentencing judges are supposed to be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision," Gregg v. Georgia, supra, 428 U.S. at 192, it nowhere appears that they are to consider whether a victim is killed because the defendant hates whites, or blacks, or women, or any other class of persons, however abhorrent the bigotry involved.

In his dissent from the original affirmance of Barclay's death sentence, Justice (now Eleventh Circuit Judge) Hatchett found the trial judge's consideration of factors outside the record, "incuding his own personal experiences," to have upset the balance mandated by the statute. (J.A. 76; Barclay v. State, supra, 343 So.2d at 1272). Justice Hatchett refers, of course, to Judge Olliff's lengthy exhortation about his experiences during World War II in Nazi Germany, a sample of which follows:

> "Similar sentiments were violently uttered on another continent in our own recent history. During World War II, I was among some of the first American Combat Parachute Infantry Soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly, the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like cord wood - to be buried or burned in the ovens.
>
> "Those people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were

> murdered because they were all guilty of the same crime - they were different from those people who murdered them. They were either of a different race, culture, religion or political belief. That was their only crime - they were different. Surely we must have learned some lasting lesson from that tragic holocaust."

(J.A. 92-93).

And again:

> "My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. I, like so many American Combat Infantry Soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers and I witnessed the concentration camps where innocent civilians and children were murdered in a war of racial and religious extermination."

(J.A. 137-38).[18] (See also J.A. 4-5, 50).

It is obviously easier for one to empathize with Judge Olliff's lasting horror at the Holocaust than to understand Barclay's violent bigotry against white people. Never-

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18/ It should be noted that in each of the sentencing orders in each of the five cases in which Judge Olliff sentenced a man to death, he commented upon his experience in World War II and the horror of that experience. (A. 40a-41a, 75a, and Dobbert v. Florida, 432 U.S. 282, 296 n.9 (1977).

theless, noble emotions are no exception to the rule that legislative standards for capital sentencing are required precisely because "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977)(plurality opinion). The manifest implication of Judge Olliff's reliance upon his experience in World War II is that Elwood Barclay's death sentence was to depend upon the capricious accident of his trial judge's history, rather than on his own. Notably, Barclay's jury recommended life for him, although the ugly motive for his crime was spread indelibly across the trial record, no less obvious to the jury than the judge. The contrast of the jury's verdict with Judge Olliff's sentence surely reflects in no small part the fact that the jurors were instructed

to consider only the statutory aggravating circumstances, while he felt free to add others of his choosing.

B. A Sentencing Process So Lawless As The One Which Condemned Barclay To Die Violates the Eighth and Fourteenth Amendments

Little argument seems necessary to demonstrate that a procedure for condemning men to die upon the basis of an ad hoc concatenation of nonstatutory aggravating circumstances and of "statutory" circumstances twisted into shapelessness violates the Eighth Amendment. The essence of this Court's decisions applying the Amendment to the process of capital sentencing has been the "insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all." Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). "Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be

inflicted in an arbitrary and capricious manner." Gregg v. Georgia, supra, 428 U.S. at 188.

The Court has never deviated from this basic principle.[19] "Furman ... require[d] that ... sentencing discretion [in capital cases] ... be 'directed and limited,' ... so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a 'meaningful basis for distinguishing the ... cases in which it is imposed from ... the many cases in which it is not.'" Lockett v. Ohio, 438 U.S. 586, 601 (1978)(plurality opinion).

19/ See, e.g., Zant v. Stephens, ___ U.S. ___, 72 L.Ed.2d 222, 225-26 (1982):

> "In Gregg v. Georgia, ... we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of Furman ... that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing

> "This means that if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.' .... It must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

Godfrey v. Georgia, supra, 446 U.S. at 428.

The role of statutory aggravating circumstances in channelling the sentencer's discre-

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19/ (continued)

capital sentences consistently with this concern."

Hopper v. Evans, ___U.S. ___, 72 L.Ed.2d 368, 373 (1982):

> "Our holding in Beck [v. Alabama, 447 U.S. 625 (1980)], like our other Eighth Amendment decisions in the past decade, was concerned with insuring that sentencing discretion in capital cases is channelled so that arbitrary and capricious results are avoided."

tion is obvious. Statutory aggravating circumstances serve three indispensable, interrelated functions in this regard:

First, because "the provision of relevant [sentencing] information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used," Gregg v. Georgia, supra, 428 U.S. at 192, statutory aggravating circumstances provide the sentencer "with standards to guide its use of the information," id. at 195. They are the primary instrument through which, "[u]nder Florida's capital-sentencing procedures, ... trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life." Proffitt v. Florida, supra, 428 U.S. at 253.

Second, statutory aggravating circumstances supply the necessary predicate for "meaningful appellate review ... to ensure

that death sentences are not imposed capriciously or in a freakish manner." Gregg v. Georgia, supra, 428 U.S. at 195. "[T]o the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida, 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Proffitt v. Florida, supra, 428 U.S. at 253. It is the specification of a fixed roster of aggravating circumstances, whose legal applicability and evidentiary support can be assessed objectively on appeal, which alone can guarantee "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" Id. at 251, quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). Statutory

aggravating circumstances are, in short, the basic tool by which capital sentencing has been brought back within the traditions of "a legal system ... operated by following prior precedents and fixed rules of law." Gregg v. Georgia, supra, 428 U.S. at 193.

Third, statutory aggravating circumstances are the means by which capital sentencing is kept "circumscribed by ... legislative guidelines." Id. at 207. They furnish the sentencer with "guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision." Id. at 192. They thus assure that the death penaty will be used only for the purposes, and within the boundaries, set for it by the regularly constituted lawmaking and policymaking organ of the State, so as to avoid the evil against which the Eighth Amendment was historically addressed:

"Severe punishments not legally authorized and not within the jurisdiction of the courts to impose." Furman v. Georgia, 408 U.S. 238, 376 (1972)(dissenting opinion of Chief Justice Burger), citing Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 CALIF. L. REV. 839, 852-60 (1969).20/

When the death penalty is meted out on the basis of an open-ended inventory of nonstatutory aggravating circumstances, limited only by the individual sentencing judge's imagination, all of these features of a regular, evenhanded, lawful administration of capital punishment are fatally undermined. A nonstatutory factor that strikes one judge as aggravating may be ignored or differently assessed by another; the same judge may overlook a factor in a

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20/ This history is also reviewed in Brief for Petitioner in Fowler v. North Carolina, No. 73-7031, at pages 27-39.

dozen cases before awakening to its significance in the thirteenth. This is the paradigm of arbitrariness. It is the rule of men, not Law. But "[w]hen we consider the nature and the theory of our institutions of government, ... we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.... [T]he law is the definition and limitation of power.... For, the very idea that one man may be compelled to hold his life ... at the mere will of another, seems to be intolerable in any country where freedom prevails.... " Yick Wo v. Hopkins, 118 U.S. 356, 369-70 (1886).

It was the purpose of Furman and its progeny to bring capital sentencing within the time-honored rule of Law. See, e.g., Gregg v. Georgia, supra, 428 U.S. at 192-93. It was the promise of Proffitt that the rule

of Law would be observed in capital sentencing in Florida -- that Florida's statutory procedures would serve "to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed." Proffitt v. Florida, supra, 428 U.S. at 260. Both the purpose and the promise are defeated by a regime where life or death depends on sentencing judges' ability and willingness to make up aggravating circumstances as they go along. "The most important safeguard presented in Fla. Stat. §921.141 ... is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." State v. Dixon, 283 So.2d 1, 8 (Fla. 1973); Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976).21/

21/ Following Lockett v. Ohio, supra, Songer v. State, 365 So.2d 696 (Fla. 1978), and the 1979 amendment to the Florida statute (see note 7 supra), the full brunt of regularizing the capital sen-

> "[P]ermitting the [sentencer] ... to consider whatever evidence of nonstatutory aggravating circumstances the prosecution might desire to present or the [sentencer] ... might discern in the testimony opens too wide a door for the influence of arbitrary factors on the sentencing determination.... [S]anctioning consideration of statutory aggravating factors plus anything else the [sentencer] ... determines to be aggravating ... broadens ... discretion rather than channels it and obscures any meaningful basis for distinguishing cases in which the death penalty is imposed from those in which it is not."

Henry v. Wainwright, 661 F.2d 56, 59 (5th Cir. 1981)(emphasis in original), vacated on other grounds, ___ U.S. ___, 73 L.Ed.2d 1326 (1982), adhered to on remand, 686 F.2d 311 (5th Cir. 1982).22/

21/ (continued)

tencing process and assuring consistency in its results now falls, of course, on the aggravating circumstances alone.

22/ Accord, Bell v. Watkins, ___ F.2d ___, No. 81-4358, slip op. at 962-65 (5th Cir. Dec. 6, 1982); Proffitt v. Wainwright, 685 F.2d 1227, 1266-67 (11th Cir. 1982); Jordan v. Watkins, 681 F.2d 1067, 1082 reh. and reh. en banc denied, 688 F.2d 395 (5th Cir. 1982); State v. Bartholomew, ___ P.2d ___, No.

The same unleashing of discretion to the vagaries of caprice results when "statutory" aggravating circumstances are allowed to be manipulated to suit the sentencing result desired. Findings of statutory aggravating circumstances made by expanding the definitions of those circumstances ad hoc to fit the facts, or by inventing facts to fit the definitions, simply flout the constitutional command of guided discretion. This too is quintessentially arbitrary. "Even in applying permissible standards, officers of a State cannot [justify their conduct by those standards] ... when there is no basis for their finding that [the standard applies] ..., or when their action is invidiously discriminatory." Schware v. Board of Bar

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22/ (continued)

48346-9, slip op. at 24-30 (Sup. Ct. Wash. Nov. 24, 1982) (en banc); but see Harris v. Pulley, ___ F.2d ___, No. 82-5246 (9th Cir. Sept. 16, 1982).

Examiners, 353 U.S. 232, 239 (1957). This Court recognized as much by invalidating the death sentence imposed under a rubber yardstick in Godfrey v. Georgia, supra. There it was unclear whether a baseless factual finding had been made to bring Godfrey within an adequately defined statutory aggravating circumstance or whether the definition of the circumstance had been enlarged sub silentio to bring Godfrey within it; but the constitutional consequence was the same. "The circumstances of this case ... do not satisfy the criteria laid out by the Georgia Supreme Court itself," 446 U.S. at 432, and Godfrey's sentence was therefore unconstitutional -- whether regarded as the result of arbitrary factfinding or as the result of "'standards so vague that they would fail adequately to channel ... sentencing decision patterns,'" id. at 428.

Indeed, the Florida Supreme Court has essentially acknowledged all of these points. Because of the key role that the statutory aggravating circumstances play in the constitutionality of Florida's capital sentencing system, that court has attempted to preserve the integrity of the system by confining consideration of aggravating circumstances to those enumerated in the statute, and by circumscribing the application of the statutory aggravating circumstances so as to avoid an overbroad or vague construction. Despite its early 4-to-3 decision in Sawyer v. State, 313 So.2d 680 (Fla. 1975), affirming a death sentence based on nonstatutory aggravating circumstances,[23/] the Florida

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23/ Sawyer's death sentence was subsequently reduced to life by the trial court on a motion to reduce sentence under Fla. R. Crim. Proc. 3.800. Sawyer v. State, No. 73-1001-C (Cir. Ct. 11th Jud. Cir., Dade Cty, Fla., Aug. 6, 1976). The Florida Supreme Court has since ruled that such motions are

Supreme Court has since held consistently that nonstatutory aggravating circumstances may not be considered in the imposition of a death sentence.[24] The use of non-

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23/ (continued)

unavailable to death-sentenced defendants. In re Florida Rules of Criminal Procedure, 343 So.2d 1247, 1264 (Fla. 1977).

24/ See, McCampbell v. State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 492 (No. 57,026) (Oct. 28, 1982) (trial judge should not have relied upon the failure of defendant to acknowledge guilt or demonstrate remorse, and on the suspected procurement of perjurious alibi testimony because those factors are not "statutorily-enumerated aggravating circumstance[s]"); Blair v. State, 406 So.2d 1103, 1108 (Fla. 1981)(premeditated design); Odom v. State, 403 So.2d 936, 942 (Fla. 1981) (arrests and charges not culminating in criminal convictions); Perry v. State, 395 So.2d 170, 174-75 (Fla. 1980) (pending criminal charges for which there was no conviction); Spaziano v. State, 393 So.2d 1119, 1122-23 (Fla. 1981) (convictions for nonviolent offenses and misdemeanors, and charges for which there was no conviction); Brown v. State, 381 So.2d 690, 695-96 (Fla. 1980)(premeditated design); Lucas v. State, 376 So.2d 1149, 1153 (Fla. 1979) ("heinousness" of attempted murders of others during incident in which victim was killed); Miller v. State, 373 So.2d 882, 885 (Fla. 1979)(defendant's incurable and dangerous mental illness coupled with possibility of future release if a life sentence were imposed); Menendez v. State, 368 So.2d 1278, 1281 & n.12 (Fla. 1979) (defendant looted body,

statutory aggravating factors was found to be unacceptable, not only because it "indicates that the weighing process dictated by statute was not followed," Mikenas v. State, 367 So.2d 606, 610 (Fla. 1979), but more importantly because it affronts the purpose of the statute "to

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24/ (continued)

pointed gun at witness who fled, and showed no signs of remorse); Mikenas v. State, supra, 367 So.2d at 610 (substantial history of prior nonviolent criminal activity considered as an aggravating circumstance, rather than merely precluding consideration of a mitigating circumstance); Riley v. State, 366 So.2d 19, 21 & n.2 (Fla. 1978)(no remorse; prolonged premeditation); Elledge v. State, supra, 346 So.2d at 1102 (criminal charge for which there was not yet a conviction); Huckaby v. State, 343 So.2d 29, 33 & n.11 (Fla. 1977)(defendant was a "danger and menace to society" and had a "propensity to commit rape"); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977)("the specified statutory circumstances are exclusive; no others may be used [to impose a death sentence]"); Provence v. State, 337 So.2d 783, 786 (Fla. 1976)("mere arrests or accusations" not reduced to criminal convictions). In two other cases nonstatutory aggravating circumstances were found by the trial court but not commented upon by the Florida Supreme Court. Proffitt v. Florida, 315 So.2d 461, 466 (Fla. 1975), aff'd sub nom. Proffitt v. Florida, 428 U.S. 242 (1976) (death sentence affirmed); Thompson v. State, 328 So.2d 1, 6 (Fla. 1976)(death sentence reversed on other grounds).

meet the constitutional infirmity of capital sentencing procedures explored in Furman v. Georgia [by] ... limit[ing] the unbridled exercise of judicial discretion in cases where the ultimate penalty is possible," Provence v. State, supra, 337 So.2d at 786. Similarly, the Florida Supreme Court has both interpreted statutory aggravating circumstances and reviewed the factual underpinnings of findings of them with a view to preventing their indiscriminate application. E.g., Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979); Riley v. State, 366 So.2d 19, 21 (Fla. 1979).

These restrictions upon the "unbridled exercise of judicial discretion" are no less important in cases where one unquestionably valid statutory aggravating circumstance has been found. The Florida Supreme Court has forbidden the consid-

eration of nonstatutory aggravating circumstances in such cases, as well as in cases where no valid statutory aggravating circumstance is proved.25/ It is true that the Florida Supreme Court has not invariably found that a trial judge's consideration of nonstatutory or improperly applied statutory aggravating circumstances was reversible error -- a point to which we shall return in Part II of this Brief,

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25/ E.g., Moody v. State, 418 So.2d 989, 995 (Fla. 1982)(although the "trial court's finding of the aggravating circumstances that this capital felony was atrocious, heinous, or cruel and that it was committed for pecuniary gain are [sic] entirely appropriate as evidenced by the record ..., the trial court erroneously considered an aggravating circumstance not supported by the evidence ... "); Menendez v. State, supra, 368 So.2d at 1281, 1282 ("three ... aggravating circumstances found by the trial judge should not have been considered, since they are outside the list of factors enumerated in our death penalty statute"; these "findings are stricken," despite the fact that there is "one properly found aggravating circumstance"); Riley v. State, 366 So.2d at 21-22 (two "aggravating circumstances clearly must be disregarded as not having been listed in Section 921.141(5)," although two other statutory aggravating circumstances were properly found).

infra. But it has recognized that any such consideration is error, even in a case where one or more valid statutory aggravating circumstances have been established.

This plainly must be the Eighth Amendment rule as well. For the thrust of all of this Court's Eighth Amendment decisions in the past decade is to insure a proper chanelling of discretion in the process of selecting, from among convicted defendants eligible for the death penalty, those who must actually die. E.g., Gregg v. Georgia, supra, 428 U.S. at 197-99. A narrowing of the class of defendants who are eligible for "consideration as a candidate for the death penalty," id. at 199, does not obviate constitutional concern about the method for choosing among those who remain candidates. E.g., Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) (per curiam); Roberts (Stanislaus) v.

Louisiana, 428 U.S. 325, 331-36 (1976).

The finding of a valid statutory aggravating circumstance functions to make the defendant a candidate. Such a finding is made in the cases of all candidates, and therefore cannot serve to distinguish among them. If, upon the finding of a valid statutory aggravating circumstance, the door is thrown open to consideration of a witch's brew of nonstatutory aggravating circumstances and lawlessly applied statutory aggravating circumstances in addition to the valid one, then the ultimate selection among death-eligible candidates is left exactly where Furman found it. This is particularly true in Florida, where at least one statutory aggravating circumstance is almost universally present in every first degree murder case. First degree murder requires a finding of either premeditation or a killing in the course of

several enumerated felonies (Fla. Stat. §782.04(1)(a)); enumerated felony-murder is (with one minor exception) always an aggravating circumstance under Fla. Stat. §921.141(5)(d); and premeditated murder was found by Judge Olliff -- and has sometimes been found by the Florida Supreme Court -- adequate to trigger the statutory aggravating circumstance of §921.141(5)(h). See note 17 supra.[26/]

The Eighth Amendment requires that a "capital sentencing scheme ... provide a 'meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not.'" Godfrey v. Georgia, supra, 446 U.S. at 427, quoting Gregg v. Georgia, supra, 428 U.S. at 313 (opinion of Justice White). No such

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26/ In addition, under the 1979 amendment of the Florida statute described in note 7 supra, premeditated murder will ordinarily trigger the aggravating circumstance of §921.141(5)(i).

basis is provided by a system which casts the runes of lawful, lawless statutory, and nonstatutory aggravating circumstances, stirs them with the sentencing judge's most intense emotive recollections, and reads the defendant's death in them. Proffitt anticipated that under the Florida statute, "after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death." Proffitt v. Florida, supra, 428 U.S. at 259. Elwood Barclay waits for this kind of sentencing process.

II. THE UNCONSTITUTIONAL PROCESS THAT PRODUCED BARCLAY'S DEATH SENTENCE REQUIRES ITS REVERSAL

The question remains whether Barclay is entitled to the reversal of his death sentence, and to a new and constitutionally proper sentencing determination at the

trial level, because of the Eighth Amendment violations shown by this record. That question implicates Florida's "Elledge rules," which we first describe and then discuss below.

A. The "Elledge rules"

In Elledge v. State, 346 So.2d 998 (Fla. 1977), the Florida Supreme Court announced a pair of rules to govern its review of cases in which a death sentence is marred by the trial judge's improper consideration of nonstatutory or legally erroneous statutory aggravating circumstances. First, reversal is required in such cases, despite the presence of one or more valid statutory aggravating circumstances, if a mitigating circumstance was found. That is so, the court reasoned, because the Florida statute requires a weighing of valid aggravating circumstances against mitigating circumstances, and

"regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Id. at 1003.[27] Second,

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27/ Accord, Moody v. State, 418 So.2d 989, 995 (Fla. 1982) (finding that murder was committed during arson, Fla. Stat. §921.141(5)(d) was not supported by the evidence; death sentence vacated and case remanded for resentencing); Blair v. State, 406 So.2d 1103, 1108-09 (Fla. 1981)(improper finding of nonstatutory aggravating circumstance of "premeditation;" "especially heinous, atrocious or cruel" and "great risk of death" aggravating circumstances were misapplied; death sentence vacated and life sentence imposed after comparing case to others); Lewis v. State, 377 So.2d 640, 646-47 (Fla. 1979) ("great risk of death" and "especially heinous, atrocious or cruel" aggravating circumstances were erroneously applied; death sentence vacated and case remanded for resentencing); Lucas v. State, 376 So.2d 1149, 1153-54 (Fla. 1979) ("especially heinous, atrocious or cruel" aggravating circumstance was misapplied; death sentence vacated and case remanded for resentencing); Fleming v. State, 374 So.2d 954, 957-59 (Fla. 1979) (same fact was improperly used to support two aggravating circumstances; "especially heinous, atrocious or cruel" aggravating circumstance was misapplied; death sentence vacated and case remanded for resentencing); Menendez v. State, 368 So.2d 1278, 1281-82 (Fla. 1979) (improper findings of

reversal is not required if one or more valid aggravating circumstances have been

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27/ (continued)

three nonstatutory aggravating circumstances; "especially heinous, atrocious or cruel" and "avoid arrest" aggravating circumstances were misapplied; death sentence vacated and case remanded for resentencing); Mikenas v. State, supra, 367 So.2d at 610 (nonstatutory aggravating circumstance found; death sentence vacated and case remanded for resentencing); Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978) (same fact was improperly used to support two aggravating circumstances; improper findings of two nonstatutory aggravating circumstances; "especially heinous, atrocious or cruel" aggravating circumstance was misapplied; death sentence vacated and case remanded for resentencing).

Where the sole sentencing error committed was a different and less serious one known as "doubling" — i.e., the use of the same fact to support two aggravating factors such as robbery, Fla. Stat. §921.141 (5)(d), and pecuniary gain, Fla. Stat. §921.141(5)(f) — the Florida Supreme Court has held that reversal is not invariably required. Vaught v. State, 410 So.2d 147, 148-49 (Fla. 1982); Hargrave v. State, 366 So.2d 1, 4 (Fla. 1978). Also, in Brown v. State, 381 So.2d 690, 696 (Fla. 1980), the first Elledge rule was found not to require reversal where the only mitigating circumstance, the fact that the defendant was twenty-three years old at the time of the offense, had been explicitly assessed by the trial judge as having "only 'some minor significance.'" Zeigler v. State, 402 So.2d 365, 376-77 (Fla. 1981), appears to be based on the premise that the trial judge made a similar finding by implication.

found, "where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." Id. at 1002-03 (emphasis in original).

B. Nonarbitrary Application Of The First Elledge Rule Requires the Vacation of Barclay's Death Sentence

In Elledge, it did "not expressly appear from the specific findings of fact that the trial judge found the existence of mitigating circumstances. His written findings expressly negate the existence of certain mitigating circumstances." Id. at 1003. But because his sentencing order recited that, "'after weighing the aggravat-

ing and mitigating circumstances,'" he had reached the "'opinion that insufficient mitigating circumstances exist to outweigh the aggravating circumstances,'" ibid., the Florida Supreme Court concluded that he "implicitly found some mitigating circumstances to exist," ibid. (emphasis in original).

In Barclay's case, there were two findings regarding the presence of mitigating circumstances. The first, by the jury, was a finding that "sufficient mitigating circumstances do exist which outweigh any aggravating circumstances...." (S.T. 180). The second, by Judge Olliff, was a finding that there are no mitigating circumstances present in the case.[28] (J.A. 107-20). How are the Elledge rules to be applied

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28/ Judge Olliff has never found a single mitigating circumstance in any of the cases in which he sentenced a defendant to death, including all four cases where the jury recommended life. (J.A. 17-32, 107-20; A. 17a-28a, 50a-60a).

in this situation?

The Florida Supreme Court answered that question in Lewis v. State, 398 So.2d 432 (Fla. 1981), a case indistinguishable from Barclay's. In Lewis, the trial judge found four statutory aggravating circumstances and "no mitigating circumstances." Id. at 438. The Florida Supreme Court upheld one aggravating circumstance and found three unsupported by the record. Ibid. It then disposed of the appeal as follows:

> "The jury recommended a sentence of life imprisonment. The trial court judge's sentencing findings contain a discussion of each of the statutory mitigating circumstances and a statement that none of them are applicable to the facts of this case. However, the jury is not limited, in its evaluation of the question of sentencing, to consideration of the statutory mitigating circumstances. It is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment. Lockett v. Ohio, 438 U.S. 586 ... (1978); Songer v. State, 365 So.2d 696 (Fla. 1978) .... Since three of

> the trial court's four aggravating circumstances have been found to be erroneous, we remand the case for reconsideration of sentence by the trial court judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury."

Ibid.

Lewis would thus appear to control the present case,[29] except for the fact that

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29/ Barclay's jury could properly take account of several nonstatutory mitigating circumstances "reasonably relevant to the question of mitigation of punishment" within Lockett and Lewis, supra. For example, Barclay was gainfully employed and the father of several children. (See page 18 supra.) Although Barclay was a principal to the homicide, he did not inflict any mortal wounds and was subservient to Dougan, who planned, directed and committed the murder. (T.T. 1356-61, 1371-2, 1385). See the dissent of Justice Boyd in Barclay v. State, supra, 343 So.2d at 1242 (J.A. 74-75). The Florida Supreme Court has often justified imposing a death sentence on the dominant figure in a homicide while other participants, both principals and accessories, receive lesser sentences. See, e.g., Bolender v. State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 490 (No. 59,333) (Oct. 28, 1982) (coparticipant received concurrent life sentences, defendant's death sentence justified because he "acted as the leader and organizer ... and inflicted most of the torture leading to the victims' deaths"); Messer v. State, 403 So.2d 341 (Fla. 1981) (coparticipant sentenced to thirty years; defendant's death sentence justified because he was the leader and inflicted the

the Florida Supreme Court has reached an apparently contrary result in several other cases, without attempting to reconcile them with Lewis or vice versa. See Bolender v.

29/ (continued)

mortal blows, while accomplice inflicted only nonfatal wounds); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981) (coparticipant received life sentence; defendant's death sentence justified because he "did the shooting and probably was the leader of the group"); Jackson v. State, 366 So.2d 752, 757 (Fla. 1978) (coparticipant received life sentence; defendant's death sentence justified because he was the "dominating" actor); Salvatore v. State, 366 So.2d 745, 751-52 (Fla. 1978) (coparticipant sentenced to term of years; defendant's death sentence justified because he formulated the plan to kill and was the actual perpetrator, accomplice refrained from beating the victim until after the defendant struck the first blows); Smith v. State, 365 So.2d 704, 705, 708 (Fla. 1978) (coparticipant sentenced to concurrent life sentences; defendant's death sentence justified because he originated the idea of setting the car on fire, which killed the victim, directed the coparticipant to ignite the car, and generally "dominated" the coparticipant that evening); Meeks v. State, 339 So.2d 186 (1976) (coparticipant received life sentence; defendant's death sentence justified because defendant inflicted mortal wounds and "was the dominant figure in this criminal episode").

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29/ (continued)

The jury might additionally have considered that death would be an excessive and disproportionate punishment for Barclay when compared with the prison sentences of Hearn, Crittendon and Evans, who were all principals to the homicide. According to Hearn's testimony, all five young men knew what Dougan had planned by the time they picked Orlando up, and none protested the plan. (T.T. 1359-61). Although there is no evidence that either Hearn or Crittendon physically participated in the homicide, Hearn provided the murder weapon. (T.T. 1356-58, 1550). Evans was said to have stabbed the victim with the pocketknife, as did Barclay. (T.T. 1183). The jury obviously differentiated the relative culpability of the participants by finding Crittendon and Evans guilty of second degree murder, recommending life for Barclay, and reserving the death sentence for Dougan. To the extent that a desire for retribution is involved in such a decision, it may well be that the jury believed the forfeit of one life for the life of the victim was sufficient expiation.

Nor can this jury be suspected of having had any substantial misgivings about the death penalty. To the contrary, during jury selection seven jurors were excused for cause because of their conscientious scruples against the death penalty (V.T. 490, 533, 538, 546, 579, 586-87, 594), and the prosecutor used his peremptory strikes to eliminate all other prospective jurors who had expressed any hesitation about imposing a death sentence, but who could not be excused for cause under the standards enunciated in Witherspoon v. Illinois, 391 U.S. 510 (1968) (V.T. 198-207, 212, 215; 234-35; 237-40; 299-300, 366; 432-37; 492-94, 502-03; 494-96, 502-03; 562-64, 568).

State, ___ So.2d ___, 1982 Fla. Law Wkly, SCO 490 (No. 59,333) (Oct. 28, 1982); White v. State, 403 So.2d 331, 336-40 (Fla. 1981); Johnson v. State, 393 So.2d 1069, 1072-74 (Fla. 1980); Dobbert v. State, 375 So.2d 1060, 1070-71 (Fla. 1979). This is a not infrequent phenomenon in Florida capital appeals, where many of the protective pronouncements which we have previously described seem to be turned on and off from case to case without notice or explanation. See notes 14, 17 supra.30/ While this might do if no federal constitutional rights were involved, such a practice cannot justify a state appellate court's episodic refusal to vindicate federal claims. See, e.g., Barr v. City of

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30/ Where explanations have been offered for divagations, they have sometimes been less convincing than their absence. See, e.g., Songer v. State, 365 So.2d 696, 700 (Fla. 1978), holding that Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), did not say what any fair reading of Cooper makes it inescapably plain that Cooper did in fact say.

Columbia, 378 U.S. 146, 149-50 (1964) and cases cited; N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 455-58 (1958). It should particularly not be permitted where the substance of the federal claim in issue is a right to have the penalty of death administered "with reasonable consistency, or not at all," Eddings v. Oklahoma, supra, 455 U.S. at 112, and where the protection of that right depends upon death sentences being "conscientiously reviewed by a court which ... can assure consistency, fairness, and rationality in the evenhanded operation of the state law," Proffitt v. Florida, supra, 428 U.S. at 259-60. Since there is no rational or evenhanded way to treat Barclay's case differently than Lewis', Barclay's death sentence too must be vacated and resentencing ordered.

C. Application Of The Second Elledge Rule To Salvage Barclay's Death Sentence Would Itself Be Federally Unconstitutional

There are several sufficient reasons why the Elledge rules cannot constitutionally be applied to affirm Barclay's death sentence on the theory that, despite Lewis, Judge Olliff's failure to find any mitigating circumstances requires affirmance under Elledge.

First, if Lewis is regarded as having been overruled sub silentio and not merely capriciously disregarded by the contrary decisions in Bolender, White, Johnson and Dobbert, then the Elledge rule requiring affirmance in the absence of a finding of mitigating circumstances plainly falls afoul of Lockett v. Ohio. For Lewis is the only case in which the Florida Supreme Court has reversed a death sentence under Elledge because of the existence of non-statutory mitigating circumstances. In Ford v. State, 374 So.2d 496, 503 (Fla. 1979), the court expressly refused to

reverse a death sentence despite "error in assessment of some of the statutory aggravating factors," because "there being no mitigating factors present, death is presumed to be the appropriate penalty [under] Elledge ...." It did so while simultaneously acknowledging the "testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial." Ibid. Thus, it appears that -- save for Lewis -- nonstatutory mitigating factors which can (and, indeed, must) be considered by the advisory jury and sentencing judge are not "mitigating circumstances" within the Elledge rules.31/ Such rules can simply not be squared with Lockett.

31/ See Moody v. State, 418 So.2d 989, 995 (Fla. 1982). In Moody, the Florida Supreme Court identified two defects in the sentencing proceedings: (1) an improperly applied aggravating circumstance; and (2) a possible failure of the sentencing judge to consider nonstatutory mitigating evidence that had been presented to the jury. In reversing

Second, the announced "state-law premises"[32] of the Elledge rules establish their unconstitutionality for a reason that appears a fortiori from Justice Stevens' recent observations concerning a

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31/ (continued)

on account of both defects, the court explicitly distinguished between statutory and nonstatutory mitigating circumstances, applying the Elledge rule to the former but not the latter: "Since the trial court erroneously considered an aggravating circumstance not supported by the evidence, since there was a valid statutory mitigating circumstance, and since the trial judge may not have considered nonstatutory mitigating factors, we set aside the death sentence and remand ...." Ibid. See also Enmund v. State, 399 So.2d 1362, 1370-71, 1372-73 (Fla. 1981), rev'd on other grounds sub nom. Enmund v. Florida, ___ U.S. ___, 73 L.Ed.2d 1140 (1982) (finding that the trial judge improperly relied upon two statutory aggravating circumstances not supported by the evidence; also finding that the defendant was not the triggerman and was not even present at the scene when a coparticipant in a robbery scheme shot the victims, and that "the evidence does not establish that [defendant] intended to take life"; but affirming the death sentence anyway, because there were two valid "aggravating circumstances ... and no mitigating circumstances"). See generally, Enmund v. Florida, supra, 73 L.Ed.2d at 1170-73 (dissenting opinion of Justice O'Connor).

32/ Zant v. Stephens, ___U.S. ___, 72 L.Ed.2d 222, 226 (1982).

less glaring deficiency in North Carolina's capital sentencing procedures. Smith v. North Carolina, ___ U.S. ___, 51 U.S.L.W. 3418 (U.S., Nov. 29, 1982)(opinion of Justice Stevens on denial of certiorari). Elledge says that findings of nonstatutory or other improper aggravating circumstances may be disregarded if there are no mitigating circumstances and "there are some [valid] statutory aggravating circumstances, [because] there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute." Elledge v. State, supra, 346 So.2d at 1003 (emphasis in original). This necessarily means that, in the absence of mitigating circumstances, the statutory "weighing process" consists of weighing zero in mitigation against any thing at all in aggravation: it does not

matter what in aggravation, since the whole point of Elledge's reasoning is that the quantity and quality of aggravation is irrelevant "so long as there are some statutory aggravating circumstances," ibid., and nothing mitigating to weigh against them. But death may not be thus decreed by a process which asks merely whether aggravation outweighs mitigation, without asking also whether the amount and kind of aggravation justify a capital sentence. To do so would require death even though the aggravation is a peppercorn's worth -- not enough to establish that the defendant is any more deserving of a death sentence than any other capital offender, and therefore not enough "to distinguish this case ... from the many cases in which [death] ... was not [inflicted]," Godfrey v. Georgia, supra, 446 U.S. at 433 -- because, in any situation to which Elledge's "weighing

process" applies, this indistinguishable peppercorn necessarily outweighs zero in mitigation. Such a "weighing process" misses the whole point, and violates the constitutional premise, of this Court's repeated insistence upon an individualized sentencing inquiry in capital cases "in order to ensure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.'" Lockett v. Ohio, supra, 438 U.S at 601, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Under Woodson and Lockett, the ultimate, indispensable constitutional inquiry must be the appropriateness of a death sentence for the defendant at bar, not some abstract weighing of scintillas against ciphers.

Third, if the "weighing process" envisaged by the Florida statute is to

escape the preceding objection, it must be because the sufficiency, and not merely the existence, of aggravating circumstances is to be considered, even where no mitigating factors are found. In Proffitt, this Court clearly assumed that that was the way in which the Florida statute worked, describing it (in its own words) as requiring that a death sentence be based upon the two findings "'(a) [t]hat sufficient [statutory] aggravating circumstances exist ... and (b) [t]hat there are insufficient [statutory] mitigating circumstances ... to outweigh the aggravating circumstances.'" Proffitt v. Florida, supra, 428 U.S. at 250 (bracketed material and elipses in original; emphasis added). Upon this assumption, Elledge stands for the proposition that a trial judge's ultimate finding that "sufficient [statutory] aggravating circumstances exist" to call

for the death penalty must be affirmed, despite the invalidity of a substantial part (amounting in Barclay's case to most) of the specific findings of aggravating circumstances which underlie the general one. That proposition cannot be defended consistently with either this Court's decisions establishing the necessary procedural framework for protection of federal constitutional rights in general (i.e., Stromberg v. California, 283 U.S. 359 (1931), and its progeny)[33] or with the Court's decisions more particularly invalidating "procedural rules that tended to diminish the reliability of the

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33/ See, e.g., Williams v. North Carolina, 317 U.S. 287, 291-92 (1942); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Cramer v. United States, 325 U.S. 1, 36 n.45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970); Sandstrom v. Montana, 442 U.S. 510, 526 (1979).

[capital] sentencing determination," Beck v. Alabama, 447 U.S. 625, 638 (1980); see id. at 638 n.13, citing cases.

We shall not impose upon the Court's time by discussing the Stromberg line at any length. It is described, and its applicability in the context of capital sentencing determinations is examined, in Part II of the Brief for Respondent in Zant v. Stephens, No. 81-89, at 30-39, and in Part I of the Supplemental Brief for Respondent in Zant (not yet paginated). Here it suffices to say that the rule of this Court for half a century under Stromberg has invariably been that a general verdict or judgment resting ambiguously upon a mixture of constitutional and unconstitutional premises must be set aside, because of the inability of a reviewing court to satisfy itself with any confidence that the unconstitutional premises did not enter into and decisively

affect the result in the trial court. That rule applies to general judgments by judges as well as to general verdicts by juries (see, e.g., Thomas v. Collins, 323 U.S. 516, 528-29 (1945)); it applies to cases in which the trial-court decisionmaker may have relied in part upon the unconstitutional premise, as well as to those in which the decisionmaker may have relied wholly on the unconstitutional premise (see Street v. New York, 394 U.S 576, 587-88 (1969)). Since the sufficiency of a totality of aggravating circumstances to call for the death sentence is manifestly the kind of opaque general judgment with which Stromberg and its line are concerned -- i.e., a judgment which, although resting on anterior findings of fact, is not compelled by any of those but involves the additional task of assessing the cumulative worth and weight of the underlying individ-

ual findings -- this judgment must be governed by Stromberg's familiar principle. Since the impact of unconstitutional aggravating-circumstances findings in producing a death sentence based partly (and, in Barclay's case, preponderately) upon them cannot be known, it would flout the Constitution to affirm such a death sentence without a remand "to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court," Eddings v. Oklahoma, supra, 455 U.S. at 119 (concurring opinion of Justice O'Connor).

It would also tax the Court's time unnecessarily to re-plow here the parallel Eighth Amendment ground examined in Part I of the Brief for Respondent in Zant v. Stephens, supra at 22-30. The nub of the matter is, as Justice O'Connor succinctly put it in her Eddings concurrence, that

"this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." 455 U.S. at 118. Consistently with that view of judicial responsibility in death cases, "[g]uarding against the arbitrary and dicriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the improper nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more." Henry v.Wainwright, supra, 661 F.2d at 59-60 (footnote omitted).

CONCLUSION

Elwood Barclay's death sentence rests

upon a welter of nonstatutory, lawless and extraneous findings of aggravating circumstances. How much these weighed in the trial judge's decision to override a jury recommendation of mercy and sentence Barclay to die cannot be calculated. The risk that they were influential is substantial,[34] and was not abated by the Florida Supreme Court's perfunctory performance of its sentencing-review function in this case. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v.Ohio, supra, 438 U.S. at 605. The judgment below should be reversed insofar as it upholds the penalty of death, so that Barclay may be resentenced in proceedings that observe the Constitution.

34/ "We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner [received]." Townsend v. Burke, 334 U.S. 736, 740 (1948).

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APPENDIX

STATUTORY PROVISIONS INVOLVED

At the time of petitioner's trial, the following provisions of the Florida Statutes were in effect:

Fla.Stat.Ann. § 782.04.[1/]

1/ Section 782.04 has been amended since petitioner's trial. It now provides:

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging

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1/ continued

determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act immediately dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to affect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in § 775.082, § 775.083, or § 775.084.

(3) When a person is killed in perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharg-

of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

1/ continued

ing of a destructive device or bomb by a person other than the person engaged in the perpetration or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony in the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to pertetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb,

(b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree, punishable by im-

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1/ continued

shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

prisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

Fla. Stat. Ann. § 921.141

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty -- Upon conviction or adjudication of guilt of a defendant of a capital

felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossiblity or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chaper 913 to determine the issue of the impositon of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter

that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).[2/] Any such evidence which the court deems to have probative value may be received, regardless of its admissiblity under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or the

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2/ Since petitioner's trial, this sentence has been amended. It now provides:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6).

State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury -- After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist;[3] and

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3/ Since petitioner's trial, this sentence has been amended. It now provides:

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death -- Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated insubsection (7), to outweigh the aggravating cir-

cumstances.[4/] In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of facts based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.08.

(4) Review of judgment and sentence -- The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire

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4/ Since petitioner's trial, this sentence has been amended. It now provides:

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances -- Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) That defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was

an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felonv was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.[5/]

5/ Since petitioner's trial, Fla. Stat. Ann. § 921.141(5) has been amended to

(6) Mitigating circumstances -- Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

5/ continued
include an addtional subsection, "(i)." Subsection "(i)" provides:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO: 74-2024 DIVISION: S
74-2131

STATE OF FLORIDA

-vs-

WALTER ALBERT CARNES

SENTENCE

The Defendant was indicted for the crimes of Murder in the First Degree of LESLIE VAN RICH and Rape of his female companion, SHIRLEY TOWNSEND.

ESSENTIAL FACTS:

The essential facts brought out at the trial were that Shirley Townsend, 35 and Leslie Van Rich, 27 had been living together in Jacksonville with

Mrs. Townsend's 11 year old daughter. That on May 12 the two adults and child were on their way back to their native Ohio when their car broke down on U.S. 1 about noon.

That the two adults tried to flag down several passing trucks for assistance but were unsuccessful. At this time the defendant, Carnes, drove up and volunteered his assistance and showed them his Merchant Seaman Identification to allay their fears as to his intentions.

That defendant offered to drive them back to Jacksonville and while doing so he got them inside his house upon a ruse. While Mr. Rich, Mrs. Townsend and the 11 year old girl were inside - defendant pulled a pistol, ordered

them to lie on a bed and tied their wrists and ankles.

That defendant cut Rich's ankles loose, took him to the back portion of the house, scuffled with him and stabbed him twice with a butcher knife and while Rich was writhing on the floor begging for help - Carnes knelt and shot him twice - at close range, in the middle of the back and in the back of the head, causing instant death.

The defendant subsequently twice raped Mrs. Townsend - once in the presence of her 11 year old daughter. Several hours later he fell asleep after consuming alcoholic beverages and Mrs. Townsend, who was a prisoner in the bed with him escaped with her daughter

- police were called to the scene and the defendant arrested.

The Jury of 12 people found the defendant Guilty of Murder in the First Degree of Rich and Rape of Mrs. Townsend, and the case was passed for Pre-Sentence Investigation and for Sentence.

The Court having heard all the evidence in this case and having previously heard and denied Motion for New Trial - does hereby adjudge the defendant guilty of each crime of which he has been found guilty and sentences him as follows:

A. As to the crime of Rape, I impose the maximum sentence of Life Imprisonment to run consecutive to the sentence imposed below herein for the crime of Murder in the First Degree.

B. As to the crime of Murder in the

First Degree The Court imposes the maximum possible sentence requiring the forfeit of the life of defendant.

C. Ordinarily it would be a useless act to run the maximum sentence for Rape consecutive to the maximum sentence for Murder in the First Degree. This is done in this case for the reason that there are now, before the Courts, challenges to the maximum penalty in First Degree Murder cases. Should such challenges prevail this Court would re-impose the maximum possible sentence for Murder in the First Degree and run the maximum possible sentence for Rape consecutive thereto.

Before imposing the sentence for Murder in the First Degree, the Court has closely examined and written its findings as to

each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes and which were guide-lines for the Jury in considering its Advisory Sentence.

The Court has summarized the facts as brought out in the trial and in the Pre-Sentence Investigation Report and applied them to each element of aggravation and/or mitigation where applicable.

In summarizing these elements the Court has listed them in reverse order by considering first the elements of mitigation.

MITIGATING CIRCUMSTANCES

A. WHETHER DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

There are several misdemeanor arrests shown on Defendant's Rap Sheet - most

of which do not show a disposition. His first arrest is shown to be in 1963 - but significantly he was arrested for the felony of (CCF) carrying a concealed firearm on May 4, 1974, which was nine days before the crimes of which he now stands convicted. (See Rap Sheet EXHIBIT #1.)

FACT:

In addition the charges of which he stands convicted there is pending in this Court a charge of Assault to Murder wherein defendant is charged with assault to murder in the first degree upon his estranged wife, Catherine Carnes, on May 3, 1974, by assaulting her with a gun. (See photocopy of Information - attached as EXHIBIT #2.)

FACT:

That according to the Information gained by the Pre-Sentence Investigation Report - which is attached hereto as EXHIBIT #3, the defendant had, three months prior to the murder, threatened the wife and children with a pistol. That one week prior to the murder the defendant had fired six shots into the residence where his estranged wife was staying with her three children, mother and grand mother.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the prior acts of defendant gain significance by the fact that they shortly preceded the murder and rape of which he stands convicted.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

The defendant did testify that he and his wife were separated at the time of the crimes - and that fact caused him concern.

FACT:

That there was no claim or defense of insanity, but upon Motion by Defense the defendant was examined by Dr. Ernest C. Miller, Psychiatrist, who reported that defendant was competent to stand trial and that he was, at the time of the crimes, able to understand the nature, quality and wrongfulness of his acts. Dr. Miller found no history of prior treatment for emo-

tional disorders. (See Doctor's Report attached as EXHIBIT #4.)

FACT:

That the Doctor reported that based on information provided to him by the defendant that he concluded defendant was in a state of self-induced intoxication at the time of the crime (which contention is refuted by the facts as set forth in Paragraph F.) The Doctor did not find that Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is little, if any, evidence of extreme mental or emotional disturbance at the

time of the crimes.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

The defendant tricked the victims, Mr. Rich, Mrs. Townsend and her daughter into his car and into his home. There, he pulled a pistol, tied them up, then untied and stabbed and shot Rich and raped Mrs. Townsend in the presence of her own child.

CONCLUSION:

There is no mitigating circumstance under this paragraph because defendant committed the murder and rape without any consent or participation by his victims.

D. WHETHER DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The evidence shows that defendant alone without aid or assistance from anyone else - committed the murder and rape.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

E. WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

No such element of duress was ascertained by the factual situation or by the Psychiatrist who examined defendant. The defendant did tell the

doctor that he was separated from his wife and that he had been drinking when the crime occurred. The word duress is defined in the dictionary as "Hardship - Severity, Imprisonment; also constraint; compulsion." Using those or even more inclusive definitions - there was absolutely no element of duress shown in the facts or in the Doctor's Report which would explain, mitigate or expiate the quality of the crime.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

As stated in Paragraph B above, Dr. Miller made written report to this Court, EXHIBIT #4, and in such report found only that defendant was separated from his wife and was drinking at the time when the crimes occurred.

FACT:

The defendant told the Doctor that he was intoxicated at the time of the crimes - yet his actions belie that contention as well. He drove the victims to his home, pulled a pistol, tied them up - released Rich and scuffled with him, stabbed him and shot him. He then forced Mrs. Townsend and her daughter to his car and drove to a Drive-In Liquor Store - at all times holding his pistol pointed at his victims. Upon returning to his

home he continued to remain armed and ordered Mrs. Townsend to prepare dinner - which he ate and then raped her in the presence of her child. That, finally, after raping her the second time - and after he had consumed a goodly portion of liquor - he went to sleep in the bed with Mrs. Townsend and she later escaped. Those actions up to and including the last act of rape were hardly those of an intoxicated man and in fact required mental and physical alertness.

FACT:

That one of the defenses was that of intoxication and the charge on intoxication from from Page 20 of the Florida Standard Jury Instructions in Criminal Cases - was given to the Jury, and they apparently did not

think he was intoxicated because they found him guilty of Murder and Rape.

OBITER DICTUM:

That the only incapacity suffered by the defendant was that he was separated from his wife and was drinking alcoholic beverages. If such conditions are said to substantially impair a man's appreciation of his criminal conduct - then it would be a Carte Blanche Invitation for the decimation of a portion of the population by men similarly situated as was the defendant herein.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

G. THE AGE OF DEFENDANT AT THE TIME OF THE CRIME.

FACT:

The defendant was born July 15, 1943 and was thirty years of age at the time of the Murder and Rape. The report of the Doctor showed that he was a physically mature male standing five feet - eleven inches tall, weighing One Hundred Ninety Four pounds and of average intelligence.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

THE COURT NOW SUMMARIZES THE FACTS BROUGHT OUT IN TRIAL AND THE PRE-SENTENCE INVESTIGATION REPORT AND APPLIES THEM TO THE ELEMENTS OF AGGRAVATION WHICH WERE CONSIDERED BY THE JURY IN ARRIVING AT THEIR ADVISORY SENTENCE.

AGGRAVATING CIRCUMSTANCES

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE WAS CONVICTED.

FACT:

The defendant was not imprisoned at the time of the murder, however, he was previously charged with assault to murder his wife and was out on bond from that charge at the time of the murder.

CONCLUSION:

Although not imprisoned - his status at the time of the crime is significant because he was on bond for a felony charge which implied great physical danger to the victim. This is more an aggravating than mitigating circumstance.

B. WHETHER THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF [sic] THREAT OF VIOLENCE TO THE PERSON.

FACT:

Although not previously convicted - the defendant was previously charged with a felony involving the use of [sic] threat of violence to the person of his wife, and the Pre-Sentence Investigation Report shows that he allegedly fired six shots into a house in which his wife was staying and that three months before the murder he allegedly threatened both his wife and children with a gun, and had also been charged with the felony of carrying a concealed firearm.

CONCLUSION:

The only element lacking under this paragraph was that he had not been convicted of such crime - even though he had been charged with it. This is more of an aggravating than a mitigating circumstance.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS JUST BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

The testimony shows that after the defendant got Mr. Rich, Mrs. Townsend and her daughter in his home - that he pointed a gun at all of them and threatened to kill them if they did not do as he ordered.

FACT:

That after the defendant murdered Rich

- he held the knife on Mrs. Townsend and ordered her to perform fellatio upon him.

FACT:

That he drove Mrs. Townsend and her daughter to a Drive-In Liquor Store and at all times, to and from the Liquor Store, he pointed the pistol at Mrs. Townsend and her daughter.

FACT:

That he raped Mrs. Townsend at gun-point while her daughter lay on the floor next to the bed.

FACT:

That, finally, he forced Mrs. Townsend to lie in bed with him while he had his gun and butcher knife within reach. Mercifully, he fell to sleep and she and her daughter escaped.

FACT:

That Mrs. Townsend and her daughter were held hostage for approximately twelve hours by defendant who was armed with a butcher knife and pistol.

CONCLUSION:

There is an aggravating circumstance under this paragraph because not only did defendant murder Mr. Rich - but he created a great risk of death to Mrs. Townsend and her 11 year old daughter.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DIS-

CHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

That Shirley Townsend, her 11 year old daughter and Leslie Van RIch were taken to defendant's home, tied hand and foot. Rich was subsequently murdered by the defendant - which left Mrs. Townsend and her daughter to the tender mercies of the defendant. He threatened them both with knife and gun and twice raped Mrs. Townsend.

FACT:

That within minutes after murdering Mr. Rich, the defendant attempted to force Mrs. Townsend to perform oral intercourse upon him. These established and uncontraverted facts lead inevitably and inexorably to the

conclusion that Rich was murdered to remove an obstacle to the sexual assault. Thus, whether, murder was done while engaged in or attempting to commit a rape, or in eliminating the hindrance to its commission - it is clear that this crime comes within the meaning and intent of this paragraph.

CONCLUSION:

There is an aggravating circumstance under this paragraph.

E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

This paragraph does not seem to apply to the present case.

F. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.

This paragraph does not seem to apply to the present case.

G. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF THE LAWS.

This paragraph does not seem to apply to the present case.

H. WHETHER THE MURDER OF WHICH DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The Defendant calculatedly and deliberately took the victims off the

highway - induced them into his home, where he twice stabbed Rich - whose only offense was that he resisted being murdered. Then, as Rich lay on the floor, writhing in pain and begging for help, the defendant knelt and placed a 44 caliber magnum pistol within inches of Rich's body and fatally shot him in the mid-back and the back of the head. That within minutes after perfoming the execution type murder - the defendant ordered Mrs. Townsend into a bedroom, dropped his trousers and requested that she perform fellatio upon him. The defendant then held the woman and her daughter hostage for 12 terror filled hours.

That such acts of the defendant shriek of callous, depraved homicidal premeditation of the basest type.

CONCLUSION:

The murder of which the defendant has been convicted was especially heinous, atrocious and cruel.

CONCLUSION OF THE COURT

THERE ARE SUFFICIENT AND GREAT AGGRAVATING CIRCUMSTANCES WHICH EXIST TO JUSTIFY THE SENTENCE OF DEATH.

In concluding these findings I would like to point out the following:

That under Florida Law the Judge sentences a defendant, convicted of Murder in the First Degree, either to death or life imprisonment. This is an awesome burden to be placed upon a Judge - but in the landmark Florida case of State vs. Dixon 283 So.2d 1, The Florida Supreme Court said that

when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory then it meets the test of Furman v. Georgia 408 U.S. 238."

My 22 years of legal experience have been almost exclusively in the field of Criminal Law. I have been a defense attorney in criminal cases, an Advisor to the Public Defender's Office on major crimes, a Prosecutor for eight and one-half years and a Criminal Court Judge and Circuit Court Judge - Felony Division - for almost four years. During these 22 years I have defended, prosecuted and held trial in almost every type of serious crime.

Because of this extensive experience I believe I have come to know and understand when, or when not, a crime is heinous, atrocious and cruel and deserving of the maximum possible sentence.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served overseas in ground combat. I have seen friends blown to bits and have seen death and suffering in almost every conceivable form.

I am not easily shocked or moved by tragedy - but this was an expecially [sic] shocking crime.

The defendant took the life of another human being by a murder that was heinous, atrocious and cruel - and he deserves to forfeit his life.

HAVING ADJUDGED YOU GUILTY OF MURDER IN THE FIRST DEGREE, I HEREBY SENTENCE YOU TO DEATH. I ORDER THAT YOU BE TAKEN BY THE PROPER AUTHORITIES TO THE FLORIDA STATE PRISON AND THERE KEPT IN CLOSE CONFINEMENT UNTIL THE DATE OF YOUR EXECUTION BE SET. THAT ON SUCH DAY YOU BE PUT TO DEATH BY HAVING ELECTRICAL CURRENTS PASSED THROUGH YOUR BODY IN SUCH AMOUNTS AND FREQUENCY UNTIL YOU ARE RENDERED DEAD.

I ADVISE YOU THAT YOU HAVE THIRTY DAYS FROM TODAY TO TAKE AN APPEAL OF THE SENTENCES WHICH I HAVE JUST IMPOSED UPON YOU AND I HEREBY APPOINT THE PUBLIC DEFENDER'S OFFICE TO REPRESENT YOU ON THE APPEAL.

MAY GOD HAVE MERCY ON YOUR SOUL.

DONE AND ORDERED AND SENTENCED IN OPEN COURT AT THE DUVAL COUNTY COURTHOUSE, JACKSONVILLE, FLORIDA, THIS THE 19TH DAY OF NOVEMBER, 1974.

/s/ Hudson Olliff
HUSDON OLLIFF, CIRCUIT JUDGE

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO. 76-1161 DIVISION: S

STATE OF FLORIDA

-vs-

ROBERT FIELDMORE LEWIS

S E N T E N C E

The defendant, Robert Fieldmore Lewis, was indicted for the crime of Murder in the First Degree of Joseph Lynwood Richards by shooting him to death. He was found guilty by jury of murder in the first degree and the case was passed until today for sentence.

Another defendant, Eddie Lee Odum, was also indicted in the murder of Richards but he was tried separately by another judge and was also convicted of murder in the first degree and previously sentenced to death by that Judge.

The fact that Eddie Lee Odum was sentenced to death for his participation in this premeditated murder - is immaterial and has no bearing upon this sentence. The sentence of Lewis is imposed on its own merits and based upon his participation in the murder.

It is interesting and yet appalling to note - that LEWIS WAS ON PAROLE FROM THE FLORIDA STATE PRISON AT THE TIME OF THIS MURDER. Odum was on MANDATORY CONDITIONAL RELEASE FROM FEDERAL PRISON.

SUMMARY OF FACTS OF CRIME

A summary of the facts of this murder as brought out in the trial were that: On January 27, 1976, Lewis and Odum advised Charles James Carter that they intended to kill Joseph Lynwood Richards and Lewis asked Carter for a shotgun. Carter testified that he got

a 12-guage [sic] shotgun and met Lewis and Odum later that evening. He testified that he drove a van, in which Lewis and Odum were riding, to the residence of Richards at 347 Trout River Drive here in Jacksonville, Florida.

Carter testified that he parked the van near the Richard's [sic] residence and that Lewis, armed with the shotgun, and Odum, armed with the rifle, went to the back of the residence. Carter said that he then heard three or fourloud [sic] shots and that Lewis and Odum came running back to the van and they sped away.

Carter said that Lewis and Odum told him that they had shot Richards while he was laying on a bed and that two women were sitting at the end of the

bed. Carter further testified that he threw the rifle in the river and hid the shotgun. Both guns were introduced into evidence and were positively identified by Carter as the murder weapons.

Testimony of investigating officers was that the entire top right portion of Richard's head had been blown away and that there were multiple wounds of the right upper arm, lower forearm, right upper torso and right thigh. Particles of blood, brains and skull matter were evidenced throughout the bedroom and the adjourning bathroom and hall area and were on the walls, ceiling and floor. The largest remaining portions of the brain was [sic] lying on the floor near the bed.

The medical examiner, an expert in phorensic [sic] pathology, testified that the massive wounds to the head were caused by a shotgun and rifle. He stated that the head contained pellets and wadding from a 12 guage [sic] shotgun and a rifle bullet. He testified that Richards had been shot from a range of 6 to 8 feet and that he had been shot 4 times with a shotgun and 2 to 3 times with a rifle. He said that either the shotgun or rifle wounds could have caused death.

The two women testified that they were sitting at the foot of the bed in which Richards was laying at the time of the shooting. They were spattered with Richards' blood and body fragments and one of the women was struck by a lead fragment from one of the

weapons. Fortunately neither of them was seriously injured or killed by the repeated blast from the deadly weapons.

The Court having heard all of the evidence in this case, having denied a motion for a new trial and having studied trial notes and the PRE-SENTENCE INVESTIGATION REPORT (PSI - a sealed copy of which is attached), is prepared to impose sentence herein. Before imposing such sentence this Court has closely examined and written its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes 941.141 [sic] and which were guidelines for the jury in considering the advisory sentence.

In summarizing these elements of aggravation and/or mitigation, the Court has listed them in reverse order - as follows:

MITIGATING CIRCUMSTANCES 941.141 [sic]

A. THAT THE DEFENDANT HAD NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

That from 1-14-66 up to the date of this convicton the defendant had been arrested 14 times.

FACT:

That the PSI showed that he was convicted of at least 8 misdemeanors and at least 5 felonies.

FACT:

That in 1971, I sentenced this defendant to 7 years in the State Prison for the crime of POSSESSION OF A FIREARM BY A CONVICTED FELON. That before he had finished serving that term he was given parole on 11-5-74.

FACT:

The at the time of this murder the defendant was on PAROLE AND WHILE ON

PAROLE HE WAS CONVICTED OF AT LEAST 7 MISDEMEANORS BEFORE THE COMMISSION OF MURDER.

Unfortunately no action was taken to have his parole revoked before the commission of this murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is a history of a great amount of criminal activity by defendant prior to the commission of this murder.

B. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OF [SIC] EMOTIONAL DISTURBANCE:

FACT:

There was no evidence of any extreme mental or emotional disturbance at the

time of the murder. In fact the defense was that of an alibi. This alibi was established, in part, by relatives and friends who stated that on the day and night of the murder, the defendant was alternately "riding around with a friend, at a fish fry, at home with his girlfriend and his mother and with friends at a night-club." His girlfriend testified that after the murder he returned home and requested her and his mother to get rid of his clothing - then he re-dressed and went to the Pussy Cat night club for a festive evening.

FACT:

There is absolutely no evidence or testimony that the defendant was under the influence of extreme mental or emotional disturbance at the time of

this murder and no such inference can be drawn or implied.

CONCLUSION:

There is no mitigating circumstance under this paragraph because there is no evidence of emotional distress. Perhaps the best indication of his mental attitude after the murder was his direction to his girlfriend and mother to get rid of the murder clothes and then going out for a night on the town.

C. THAT THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

The evidence showed that the defendant shot the victim a number of times in the head at close range with a shotgun

- blowing away portions of his head and causing his instant death. There was no evidence that the victim had entred into a suicide pact with his assailants or that he knew of their plan to murder him - or that he participated in his own murder.

CONCLUSION:

There is no mitigating circumstance under this paragraph because the defendant did - by stealth and pre-meditation - shoot and kill the victim and the same was obviously done without the foreknowledge or consent of the victim.

D. THAT THE DEFENDANT WAS AN ACCOMPLICE IN THE OFFENSE FOR WHICH HE IS TO BE SENTENCED BUT THE OFFENSE WAS COMMITTED BY ANOTHER PERSON AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The defendant, Lewis, was a principal with Odum in the premeditated murder of the victim, Richards. The evidence established that Lewis had a shotgun and that Odum had a rifle and that they both fired a number of shots into the head and body of the victim. The medical examiner stated either the shotgun or rifle wounds could have caused the death.

FACT:

There was absolutely no evidence presented in the trial or otherwise which indicted Lewis was more or less of a willing participant in the murder than was Odum. The defense was that of alibi and it was not heard to be said that the crime was primarily committed by Odum - or that the

participation of Lewis was relatively minor.

CONCLUSION:

There is no mitigating circumstance under this paragraph because it appears from the evidence at trial that the defendant was a principal and that his own participation was at least equal to that of the other defendant, Odum.

E. THAT THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

Although there was some testimony that Richards had previously threatend Lewis and Odum - there was no evidence or testimony that Lewis was under duress on the day of the murder or at any time leading up to that date.

FACT:

There was no evidence or testimony that Lewis was under the substantial domination of Odum - or that Odum was under the substantial domination of Lewis. The facts and testimony indicate that both Lewis and Odum equally planned and participated in the murder of Richards.

CONCLUSION:

There is no mitigating circumstance under this paragraph. The evidence shows that Lewis was an equal and eager participant in the murder.

F. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

The defendant had - during his life of crime - been arrested at least 14 times and had been convicted of at least 4 felonies and 8 misdemeanors. He, above all people, should have understood and appreciated the criminality of his conduct. His terms in the county jail and in the state prison - would have impressed even the most obtuse person with the consequences of criminal acts and certainly with the criminality of premeditated murder. His actions in telling his girl friend and his mother to get rid of his murder clothes is certainly evidence of his keen understanding of the criminality of his acts and the consequences of them.

FACT:

There is no evidence that the defendant's capacity to conform his conduct to the requirements of the law was substantially impaired. There was no claim of insanity, or incompetency or diminished capacity. In fact the only evidence of his mental capaciaty is found in the PSI. In that report it shows that after the defendant was arrested for a felony in 1971, he was examined by the psychiatrist, Dr. Ernest Miller. Dr. Miller reported that he was competent to stand trial and that the defendant had "a passive dependent personality with very prominient [sic] paranoid and psychopathic components." Subsequently he was sentenced to 7 years in the State Prison. Since that time there is no

evidence of psychiatric treatment or examination.

FACT:

That the defense herein was alibi and there is no evidence or testimony by defense witnesses or other witnesses that defendant's ability to conform his conduct to the requirements of the law was substantially impaired.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

G. AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:

That at the time of the crime the defendant was 28 years of age. He was not a callow youth. He had completed the ninth grade of school,

had served in the military, had served terms in the state prison and the county jail and had been married and fathered children in and out of marriage. (See PSI) His age is an immaterial factor in this case except that it shows that he was a mature man capable of appreciating the enormity of his crime and the possible consequences thereof.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

CONCLUSION OF THE COURT

There are no mitigating circumstances existing either by statute or factually - which outweigh the aggravating circumstances to justify a sentence of life

imprisonment rather than a sentence of death.

THE COURT NOW SUMMARIZES THE FACTS BROUGHT OUT IN TRIAL AND THE PRE-SENTENCE INVESTIGATION REPORT AND APPLIES THEM TO THE ELEMENTS OF AGGRAVATION WHICH WERE CONSIDERED BY THE JURY IN ARRIVING AT THEIR ADVISORY SENTENCE.

AGGRAVATING CIRCUMSTANCES 941.141 [sic]

A. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT.

FACT:

The PSI attached shows the full and complete criminal record of the defendant. He had previously been convicted of at least 4 felonies. IN [sic] the year 1971, this defendant

appeared before me and I sentenced him to a term of 7 years in the State Prison for the crime of possession of a firearm by a convicted felon.

FACT:

That before he had finished serving the term I imposed upon him - he was placed on parole on 11-5-74, and he was out on parole at the time of this murder. In fact he was still under sentence of imprisonment but was on parole.

FACT:

That not only was the defendant under a sentence of imprisonment at the time of the murder - but significantly - the crime for which he was under sentence was for possession of a firearm by a convicted felon.

FACT:

That while on parole the defendant was convicted of at least 7 misdemeanors and for 4 of those misdemeanors he was sentenced to terms in the County Jail. It appears no action was taken to revoke his parole for his criminal activities or his failure to comply with the terms and conditions of parole before he committed this murder.

CONCLUSION:

This is an aggravating circumstance because he had been sentenced to a term in the State Prison and was given a parole before he finished serving that term and was under parole at the time of this murder.

B. THAT AT THE TIME OF THE CRIME FOR WHICH HE IS TO BE SENTENCED. [sic] THE DEFENDANT HAD BEEN PREVIOUSLY CONVICTED OF ANOTHER CAPITAL OFFENSE OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO SOME PERSON.

FACT:

That on 1-4-66 the defendant was convicted of breaking and entering with intent to commit a felony and grand larceny. He was placed on two years probation. The breaking and entering into the house or building of another person is a crime where violence or threat of violence is always present - since there is imminent danger of confrontation between the defendant and the unsuspecting victim.

FACT:

Approximately 11 months later - on 12-23-66, the defendant was again convicted of the crime of breaking and entering with the intent to commit a felony and on this occasion he was sentenced to a term of 2 years in the Duval County Jail. Here again, is a crime where violence or threat of violence is present in the nature of the crime itself.

FACT:

On 10-25-67 the defendant was convicted of the felony of escape while serving the term as set forth in the paragraph above. Whether any violence was involved in the escape is not known.

FACT:

On 9-9-68 the defendant was again convicted of the crime of escape. Whether any violence was involved in the escape is not known.

FACT:

On 7-27-71 the defendant was convicted of Possession of Firearm by a Convicted Felon. Such a crime certainly seems to involve the threat of violence - when a convicted felon is in possession of a firearm. The threat of violence inherent in such a crime is so apparent that the statutes make it a felony in the second degree even without requiring an overt act with the firearm by the felon.

CONCLUSION:

There is an aggravating circumstance

here in view of the nature of the crimes for which he was previously convicted.

C. THAT THE DEFENDANT, IN COMMITTING THE CRIME FOR WHICH HE IS TO BE SENTENCED, KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS:

FACT:

That the defendant fired a shotgun 4 times at close range - into the body of Richards. That at the time such shots were fired - the defendant, Lewis knew that there were two women sitting at the foot of the bed where Richards was laying. A lead pellet struck one of the women. Both women were spattered with the victim's blood and particles from the upper portions of his head.

FACT:

That by firing a shotgun several times at such close range the defendant, Lewis, did create a great risk of death to the two women who were just a few feet from Richards. The fact that one of the women was hit by a pellet and both were spattered with blood and body fragments of the victim is evidence in itself that the defendant did create a great risk of death to the two women.

CONCLUSION:

That there is an aggravating circumstance here because in committing the murder of Richards the defendant, Lewis, did create a great risk of death to many persons.

D. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN OR WAS AN ACCOMPLICE IN THE COMMISSION OF OR AN ATTEMPT TO COMMIT OR A FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT ANY ROBBERY, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

That this paragraph does not seem to be applicable even though it is evident that the defendant was in the commission of the felony of Possession of a Firearm by a Convicted Felon at the time of the murder - and was in violation of the terms and conditions of his parole, that is - associating with known felons - at the time of the

commission of the murder for which he is to be sentenced.

E. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:

This paragraph does not seem to apply to the present case.

F. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED FOR PECUNIARY GAIN.

FACT:

That this paragraph does not seem to be applicable in the present case even though there was some testimony that Richards had previously made a demand

upon both Lewis and Odum for the payment of money.

G. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS COMMITTED TO DISRUPT OR HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS:

FACT:

That this paragraph does not seem to be applicable to the present case.

H. THAT THE CRIME FOR WHICH THE DEFENDANT IS TO BE SENTENCED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

FACT:

The defendants, Lewis and Odum, planned the premeditated murder of Richards and the testimony shows that they asked Carles [sic] Jimmy Carter

to assist them and to provide a shotgun.

FACT:

That, by pre-arrangement, Lewis and Odum met Carter at a place from which they proceeded by van to the residence of Richards. That Lewis, armed with a shotgun, and Odum, armed with a rifle, then proceeded to the Richards' residence and brutally shot him to death as he layed [sic] on the bed with two women sitting nearby.

FACT:

That this murder was coldly and calculatedly planned and stealthly [sic] carried out. IT WAS, IN FACT, AN ILLEGAL EXECUTION, and was not done in the heat of passion and lacked any elements of self-defense or any pretense of justification.

CONCLUSION:

The murder of which the defendant stands convicted was a cowardly and dastardly act of savage butchery - carried out under the cover of night and was in all respects an especially heinous, atrocious and cruel crime. That there are sufficient and great aggravating circumstances which exist to justify the sentence of death.

FINDINGS OF THE COURT

The heinous, atrocious and cruel nature of the crime together with the extensive criminal activities of the defendant shows that he is incapable of living in a free or institutional society and that his life should be forfeited.

THE SANCTITY OF LIFE IS REVERED BY ALL THINKING MEN - YET CAN IT BE SAID THAT

THE LIFE OF A CONVICTED MURDERER IS MORE PRECIOUS THAN THAT OF THE MURDER VICTIM? OBVIOUSLY NOT, - AND THEREFORE, THE MAXIMUM PENALTY OF DEATH MUST BE IMPOSED.

COMMENTS OF COURT

In concludng my findings I would like to point out that my 24 years of legal experience have been almost exclusively in the field of criminal law.

The Judge of this Court has been a defense attorney of criminal cases, a prosecutor for eight and one-half years, and Advisor to the Public Defender's Office and a Criminal Court and Circuit Court Judge - Felony Division for 6 years. That during this 24 years I have defended, prosecuted and held trial of almost every type of serious crime.

My experience with the sordid, tragic and violent side of life has not been confined to the Courtroom. During World War II, I was a United States Army Paratrooper and served in ground combat in Europe. I have seen death and suffering in almost every conceivable form.

I am not easily shocked or moved by tragedy - but this was an especially heinous, atrocious and cruel crime - and is deserving of no sentence but death.

S E N T E N C E

I hereby adjudge you to be guilty of murder in the first degree and I sentence you to death by electrocution. I order that you be taken by the proper authorities to the Florida State Prison and there kept

in close confinement until the date of your execution be set. That on such day you be put to death by havng electrical currents passed through your body in such amounts and frequency until you are rendered dead.

I advise you that you have thirty days from today in which to take an appeal from the conviction and sentence herein and I hereby appoint the Public Defender's Office to represent you on such appeal.

May God have mercy on your soul.

DONE AND ORDERED and SENTENCED in OPEN COURT this the 3rd. day of December, 1976, at Jacksonville, Duval County, Florida.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF, CIRCUIT JUDGE

FLORIDA PAROLE AND PROBATION COMMISSION

PRESENTENCE INVESTIGATION [EXCERPTS]

* * * *

II. PRIOR ARRESTS AND CONVICTIONS: A check with the records of the Jacksonville Sheriff's Office, the National Crime Information Center and the Florida Crime Information Center revealed that the defendant had the following arrests.

PLACE:	DATE	CHARGE	DISPOSITION
Jacksonville, Fla.	4-28-69	Petit Larceny Morals Charge	10 days suspended sentence
Jacksonville, Fla.	5-25-70	Grand Larceny	nol prossed
Jacksonville, Fla.	4-26-71	Uttering a Forgery (3 counts) Possession of Stolen Property	nol prossed
Jacksonville, Fla.	6-16-71	B & E With Intent to Commit a Felony & Grand Larceny	5 years probation

Jacksonville, Fla.	10-7-71	Breaking & Entering Possession of Stolen Property	nol prossed, discharged
Jacksonville, Fla.	11-1-71	Forgery and Uttering a Forgery	6 months County Jail
Jacksonville, Fla.	3-21-72	DC, Creating a Disturbance & DC, Profanity	nol prossed $25.00 suspended fine.

* * * *

CONFIDENTIAL EVALUATION

* * * *

II PRIOR ARRESTS AND CONVICTIONS:

Adult: The significant factors concerning the defendant's adult arrest record are that he has been placed on probation on two occassions [sic] and incarcerated on one.

On June 22, 1972 the defendant was placed on 3 years probation for the offense of attempted uttering of a forgery and he violated that probation by being re-arrested on a charge of Breaking and Entering. On November 1, 1971, his probation

was revoked at which time he was sentenced to serve 6 months in the County Jail. At that same time, however, the defendant was placed on a new 5 year term of probation for the new offense of Breaking and Entering With Intent to Commit a Misdemeanor. The defendant's progress under supervision relating to that period of probation was considered good and on January 25, 1974, his probation was terminated early because the best interest of society were [sic] felt to have been served.

Juvenile: A check with the records of the Jacksonville Juvenile Court failed to reflect any record for the defendant.

* * * *

Office-Supreme Court, U.S.
FILED
JAN 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-6908

IN THE SUPREME COURT OF THE UNITED STATES
FALL TERM, NINEETEEN HUNDRED AND EIGHTY-TWO

Elwood C. Barclay,

Petitioner,

-v-

State of Florida,

Respondent.

On Writ of Certiorari To
The Supreme Court of Florida

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT PROPERLY UPHELD THE IMPOSITION OF THE DEATH PENALTY IN THE FACE OF AN IMPROPER AGGRAVATING CIRCUMSTANCE WHERE THERE WERE NO MITIGATING CIRCUMSTANCES TO BE WEIGHED AGAINST OTHER PROPER AGGRAVATING CIRCUMSTANCES.

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OPINIONS BELOW

The original opinion of the Supreme Court of Florida is reported as Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978). The opinion remanding the case to the trial court for a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977), is reported as Barclay v. State, 362 So.2d 657 (Fla. 1978). Following the hearings in the trial court, appeal was taken to the Florida Supreme Court and the decision of that court is reported as Barclay v. State, 411 So.2d 1310 (Fla. 1981), reh.denied, April 14, 1982.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on June 4, 1981, reh. denied, April 14, 1982. The petition for certiorari was filed on June 16, 1982, and

granted on November 8, 1982. ___ U.S. ___, 51 U.S.L.W). 3362 (No. 81-6908). The jurisdiction of this Court rests upon 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States which provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

This case also involves the following provisions of the statutes of the State of Florida which were in effect at the time of petitioner's trial: Fla.Stat. §§ 782.04, 921.141. Both statutes are reproduced in the appendix to petitioner's brief and need not be repeated here.

STATEMENT OF THE CASE

A. History of the Case.

On September 26, 1974, petitioner and three others were charged by grand jury indictment with the June 17, 1974 murder of Stephen Orlando (R Vol.I, p. 1).[1] On February 19, 20, 1975, the jury was selected for the trial of petitioner and his codefendants. The jury was made up of both men and women, blacks and whites. Petitioner was convicted of murder in the first degree.

1/ References are to the record on appeal filed in the Florida Supreme Court. The symbol "R" is used to designate references to the record proper. The symbol "Pre-T" is used to designate references to the 4 volumes of pretrial proceedings. The symbol "JS" is used to designate references to the four volumes of jury selection proceedings. The symbol "Tr." is used to designate references to the 12 volumes of trial proceedings. The symbol "Post-Tr." is used to designate references to the 3 volumes of post-trial proceedings. The reference symbols in each case be followed by appropriate volume and page number.

A bifurcated sentencing hearing was held on March 5, 1975 (Post-Tr.Vol.I), and the jury returned an advisory sentence of life imprisonment for petitioner (R Vol.I, p. 186). However, the trial judge did not follow the jury's recommendation of life imprisonment but sentenced him to death by electrocution. The factual basis for the trial judge's decision listing both aggravating and mitigating circumstances appears in the Sentence (R Vol.II, pp. 217-247).

On direct appellate review, the Florida Supreme Court affirmed petitioner's conviction and sentence of death. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892 (1978). Subsequent to this Court's decision in Gardner v. Florida, 430 U.S. 349 (1977), the Florida Supreme Court remanded the case to the trial court for a hearing at which

petitioner was to be afforded the opportunity to rebut any information contained in the presentence investigation report, whether in the confidential portion of the report or any other part. Barclay v. State, 362 So.2d 657 (Fla. 1978). Following the hearings in the trial court, the Florida Supreme Court again affirmed the trial judge's imposition of the death sentence. Barclay v. State, 411 So.2d 1310 (Fla. 1981), reh.denied, April 14, 1982. A petition for certiorari was filed on June 16, 1982, and granted on November 8, 1982.

B. Statement of the Facts

On Sunday, June 16, 1974, William Lee Hearn was playing basketball in a park in Jacksonville, Florida (Tr.Vol.VII, p. 1351) when he was confronted by Jacob John Dougan, Jr., petitioner's codefendant, and asked if he had his gun (Tr.Vol.VII,

p. 1353). It was at this point in time that Hearn, petitioner, and codefendant Dougan, along with codefendants Evans and Crittendon, all black males, began the first event that lead to the murder of Stephen Orlando. Dougan advised everyone to go home and change into dark clothes (Tr.Vol.VII, p. 1355) and then for everyone to meet at petitioner Barclay's house (Tr.Vol.VII, p. 1357). They were to proceed from there.

Hearn brought his .22 caliber pistol (Tr.Vol.VII 1355, 1356), and petitioner Barclay brought his pocketknife (Tr. Vol.VII, p. 1357). Dougan took possession of the pistol and gave directions where to go (Tr.Vol.VII, p. 1358). After two stops in Jacksonville, it was apparent to the rest of the group what Dougan and petitioner were planning. When the group first stopped, Dougan wrote a note which read:

> Warning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. The revolution has begun and the oppressed will be victorious. The revolution will end when we are free. The Black Revolutionary Army. All power to the people.

(Tr.Vol.VII, p. 1359; R Vol.II, p. 222) At the next stop, Dougan stated the plan, "catch a white devil and kill him and leave the note on him." (Tr.Vol.VII, p. 1361) All parties agreed to this plan and evidenced their agreement by their participation in the subsequent events (Tr.Vol.VII, p. 1362-1392).

The group then drove through Jacksonville seeking out a victim. After a few abortive attempts, they left the downtown area and headed toward the beach. Upon arriving in Jacksonville Beach, a young white male was seen hitchhiking and was picked up by the group (Tr.Vol.VII, pp. 1369, 1370). The

hitchhiker identified himself as Stephen. Hearn who was driving the car took a southerly direction along the ocean. Although the hitchhiker Steven said he wanted to stop on 12th Street (Tr.Vol.II, p. 137), Dougan had Hearn to continue going south under the pretext that they were to meet a girl with drugs (Tr.Vol.VII, p. 1372).

The car continued following its southerly course until Dougan had Hearn drive on to a dirt road. After reaching a dead-end of trash, the car was turned around and stopped. Stephen, the hitchhiker, was ordered out of the car and when he got out attempted to run but was stopped by Dougan who hit him in the back with a .22 pistol (Tr.Vol.VII, pp. 1377-1382). Petitioner Barclay and codefendant Evans then dragged Stephen to the back of the car where Dougan and petitioner threw

him down to the ground. Petitioner Barclay then proceeded to stab Stephen repeatedly while he was on the ground and all the while Stephen was begging for mercy (Tr.Vol.VII, p. 1385; Vol.VI, p. 1019). Dougan then shot Stephen in the head twice with Hearn's .22 caliber pistol and, had not the gun jammed, would have shot him several more times (Tr.Vol.VII, pp. 1386-1389; Vol.VI, p. 1019). Petitioner Barclay and codefendant Evans then attempted to stick the note written earlier by Dougan into Stephen's chest with the pocketknife (Tr.Vol.VII, pp. 1387- 1391; Vol.VI, p. 1017). Petitioner Barclay and codefendants Dougan, Evans, and Crittendon, along with Hearn, all left the scene of the murder in Hearn's car and returned home (Tr.Vol.VII, pp. 1391, 1392).

On June 18, 1974, the body of Stephen Orlando was examined by a physician who

testified that there were multiple stab wounds to the chest, stomach, and back, a total of 12 wounds (Tr.Vol.I, pp. 125-129; Vol.II, p. 1318). There were two bullet wounds to the head, the bullets entering the left ear and left cheek. Death resulted from the bullet entering the left ear (Tr.Vol.I, p. 133; Vol.VII, p. 1318).

Subsequently, after requesting permission from a friend, petitioner Barclay and codefendants made taped recordings of the murder at the friend's house (Tr.Vol.V, p. 946; Vol.VII, p. 1398). On Wednesday, June 19, 1974, petitioner Barclay and codefendants Dougan, Crittendon, and Evans, Hearn, and friends Otis Bess and Eldridge Black met at Jim Mattison's house and made five taped recordings describing the murder of Stephen Orlando (Tr.Vol.V, pp. 947-950; Vol.VII, p. 1398; Vol.VII, p. 1403). The taped

recordings were graphic depictions of the events surrounding Stephen Orlando's death. The tapes contained statements of alleged racial inequality in America and called for a revolution of blacks against whites. Here, in the tapes, petitioner Barclay and his codefendants labeled themselves as the Black Liberation Army. (The tapes were transcribed in their entirety and are found at Tr.Vol.VI, pp. 1014-1043). These tapes implicating petitioner Barclay and codefendants in the murder of Stephen Orlando were sent to various radio and television stations in the Jacksonville area, the victim's mother, and two area police stations (Tr.Vol.II, pp. 382-397; Vol.III, pp. 408-416, 455; Vol.V, p. 950; Vol.VI, p. 1181). At trial, there was testimony by friends of petitioner Barclay and codefendant Dougan that most of the tapes were made by

petitioner Barclay and Dougan and that it was their voices on the tapes (Tr.Vol.V, pp. 951- 953; Vol.VI, pp. 1004-1008, 1181). (See also the transcription of the tapes at Tr.Vol.VI, pp. 1021-1031; 1040-1043).

Along with the tapes explaining petitioner Barclay's involvement in the murder of Stephen Orlando, both petitioner and codefendant Dougan made statements to friends admitting their part in the crime (Tr.Vol.VI, pp. 1182-1184; Vol.VII, pp. 1254-1258, 1399). Also witnesses had seen petitioner and the other participants in the murder in possession of the .22 caliber pistol that was used to murder Stephen Orlando. At trial, there was testimony that Vivian Carter had thrown the murder weapon, along with another gun, into a creek in Jacksonville. The Jacksonville Sheriff's office recovered the same guns

from the creek (Tr.Vol.III, pp. 530-540). The weapons were sent to the F.B.I. and it was established that the .22 caliber shell casing found at the side of Stephen Orlando's body (Tr.Vol.II, p. 291) came from William Hearn's .22 pistol (Tr.Vol.VIII, p. 1548).

Petitioner Barclay was tried for the murder of Stephen Orlando, along with codefendants Dougan, Crittendon, and Evans in February-March of 1975. The prosecution presented the testimony of 29 witnesses, including that of eyewitness William Hearn who turned state's evidence after pleading guilty to second degree murder (Tr.Vol.VII, pp. 1348, 1349). Many exhibits were admitted into evidence by the trial judge, including the murder weapon, photographs of the body, the scene of the crime, the note found on the murder victim, exemplars of codefendant Dougan's handwriting, the

pocketknife used by petitioner Barclay to stab the victim, and the numerous tapes made by the group describing the murder and calling for a revolution of blacks against whites.

A jury returned verdicts of guilty of murder in the first degree as to both petitioner Barclay and codefendant Dougan (R Vol.I, pp. 179, 180). Following a bifurcated hearing held on March 5, 1975, the jury after deliberating approximately twenty minutes returned with a recommendation of life imprisonment for petitioner Barclay and death for his codefendant Dougan (R Vol.I, pp. 185, 186). On April 10, 1975, the trial judge pronounced the sentence of death on both petitioner and codefendant Dougan and gave his reasons and factual bases therefor in the Sentence (R Vol.II, pp. 217- 247; Post-Tr.Vol.II, pp. 77-109).

SUMMARY OF ARGUMENT

A. Florida Supreme Court's Standard of Review

In its review of death penalty cases, the Florida Supreme Court logically assumes that where there are multiple statutory aggravating circumstances and no mitigating circumstances, the weighing process would have reached the same outcome even had the sentencing court not considered an aggravating circumstance found impermissible. This standard of review is well illustrated in Ford v. State, 374 So.2d 496 (Fla. 1979), cert.denied, 445 U.S. 972 (1980), where the court had this to say:

> Consequently, even though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty. Elledge v. State, 346 So.2d 998 (Fla. 1977); State v. Dixon, supra.

Id. at 503. See also Shriner v. State, 386 So.2d 525 (Fla. 1980), cert.denied, 449

U.S. 1103 (1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919 (1979); and Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912 (1980). Dobbert is interesting. There, the Florida Supreme Court held that the trial judge improperly found two aggravating circumstances. But since there were no mitigating circumstances, a reversal of the death sentence was not required. Note the following:

> Since there are one or more validly found aggravating circumstances and no mitigating circumstances, a reversal of the death sentence is not necessarily required. Elledge v. State, 346 So.2d 998 (Fla. 1977); Hargrave v. State, 366 So.2d 1 (Fla. 1978).

Id. at 1071. It is submitted that the Florida Supreme Court's standard of review has achieved the goals of rationality, consistency and fairness enunciated in Proffitt v. Florida, 428 U.S., at 258-60, and Furman v. Georgia, 408 U.S. 238 (1972).

B. Application of Harmless Error Rule

More than thirty years ago the Florida Supreme Court held that the harmless error rule was applicable in capital cases. North v. State, 65 So.2d 77 (Fla. 1952). Consequently, it is nothing new for the Florida Supreme Court to apply the harmless error rule in appropriate circumstances, even in death cases. Two recent examples of the application of the rule are found in Ferguson v. State, 417 So.2d 631 (Fla. 1982), and Ferguson v. State, 417 So.2d 639 (Fla. 1982). Indeed, although couched in different language, the Florida Supreme Court applied the harmless error rule in Dobbert v. State, supra. See also the remarks of Chief Judge Godbold, dissenting in part and specially concurring in part, in Ford v. Strickland, ___ F.2d ___ (11th Cir. 1983) No. 81-6200, opinion filed January 7, 1983, en banc, approving the

application of the harmless error rule by the Florida Supreme Court, quoted infra.

C. The Rejection of Alleged Mitigating Circumstances

The consideration of aggravating and mitigating factors are factual matters which the Florida Supreme Court will not disturb unless there is an absence or lack of substantial competent evidence to support those findings. In Mikenas v. State, 407 So.2d 892 (Fla. 1981), in answer to a defendant's argument that the trial judge should have considered certain testimony as a mitigating circumstance, the court had this to say:

> The testimony was apparently permitted by the trial court in an abundance of fairness to defendant, but the court was not required to give it weight as a mitigating circumstance.

Id. at 893. This procedure was followed in Dobbert v. State, supra, where the court

rejected a contention that the trial court should have found certain mitigating circumstances and held that the trial judge did not err in his determination that there were no mitigating circumstances.

D. Florida's Achievement of a Rational, Consistent and Fair Sentencing Procedure

The Florida death penalty statute was carefully drafted to meet the requirements articulated by this Court in Furman v. Georgia, 408 U.S. 238 (1972), and that effort was rewarded by this Court's stamp of approval in Proffitt v. Florida, supra. To ensure that a trial judge had all relevant necessary evidence for individualized sentencing in capital cases, the legislature in § 921.141(1) provided in pertinent part as follows:

> In the Proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include

> matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Florida's death penalty statute complies with the sentiments expressed in Gregg v. Georgia, 428 U.S. 153 (1976), where this Court indicated that before a death sentence may be imposed, the attention of the sentencing authority must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime.

The construction put upon Florida's death penalty statute is found in State v. Dixon, 283 So.2d 1 (Fla. 1973), where the court pointed out that when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence

unless it or they are overridden by one or more of the mitigating circumstances provided in the statute and that all evidence of mitigating circumstances may be considered by the judge or jury. It is significant that to this date the Florida Supreme Court's construction of this state's death penalty statute has not been challenged, much less overturned. It is submitted that the Supreme Court of Florida is the ultimate authority on Florida law and its interpretation of state statutes should not be questioned. Tennon v. Ricketts, 574 F.2d 1243, 1245 (5th Cir. 1978), cert.denied, 439 U.S. 1091 (1979); Wainwright v. Stone, 414 U.S. 21 (1973).

E. A Search for Reasonableness

In McGautha v. California, 402 U.S. 350 (1971), this Court rejected a claim that a bifurcated trial and the submission of

specific aggravating or mitigating circumstances to the jury were requirements under the United States Constitution. A little more than a year later, the Court handed down Furman v. Georgia, 408 U.S. 238 (1972), which resulted in confusion among courts, legislatures, as to what was required to impose the death penalty in conformance with the Constitution. Four years later, the confusion was to some degree clarified by Gregg v. Georgia, 428 U.S. 153 (1976). But since Gregg, the Court has continued to periodically modify its view as to what is constitutionally required to impose the death sentence, steadily placing new areas and issues of capital sentencing procedure under the umbrella of constitutional "due process," voiding new state statutes and releasing more condemned criminals from their sentence in the process. The term

"finality," as explicated in United States v. Frady, ___ U.S. ___, 71 L.Ed.2d 816, 102 S.Ct. ___ (1982), is meaningless in death penalty litigation and has been relegated to a status of judicial limbo.

It is submitted that we cannot continue to steep capital defendants in unduly expansive procedural protections. At some point, it must be acknowledged that the torturous procedural path of capital cases does more to undermine the criminal justice system and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. At some point, hopefully, it should be admitted that the people of the State of Florida are also entitled to due process of law. Stein v. New York, 346 U.S. 156, 197 (1953).

ARGUMENT

THE FLORIDA SUPREME COURT PROPERLY UPHELD PETITIONER'S DEATH PENALTY BECAUSE IT WAS BASED ON PROOF BEYOND A REASONABLE DOUBT OF MULTIPLE AGGRAVATING CIRCUMSTANCES AND THERE WERE NO MITIGATING CIRCUMSTANCES.

A. Florida Supreme Court's Standard of Review

The thrust of petitioner's argument is that the trial judge erred in considering a non-enumerated statutory aggravating circumstance for the purpose of showing the nonexistence of a statutory mitigating circumstance. It was necessary to consider petitioner's prior criminal record because unless the existence of this mitigating circumstance was negated, then there would be a presumption that petitioner had not engaged in any previous criminal activity. The Florida Supreme Court's position is stated in Booker v. State, 397 So.2d 910 (Fla. 1981), cert.denied, 102 S.Ct. 493:

There were no mitigating circumstances to be weighed against the aggravating circumstances. The defendant's reliance on Elledge v. Stste, 346 So.2d 998 (Fla.1977), is misplaced because the record reveals that the trial court did not take into account in the "weighing process" any conceivable non-statutory aggravating circumstances. The questions posed to the defendant during cross-examination were used to negate a mitigating circumstance, i.e., that defendant had a significant history of prior criminal activity. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Knight v. State, 338 So.2d 201 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976). When the defendant elects to testify during the sentencing proceedings, it is appropriate for the prosecutor to cross-examine him concerning previous criminal activity. Unless this mitigating factor is negated, there would be a presumption that defendant had not engaged in any previous criminal activity. It is apparent from an examination of the findings of the court that this evidence was not considered as an aggravating factor. The principles announced in Elledge, supra, and Mikenas v. State, 367 So.2d 606 (Fla. 1978), are not applicable.

397 So.2d, at 918. However, the trial judge in his Summarization of Aggravating Elements did conclude that petitioner's criminal record was an aggravating circumstance (J.A. 120, 121)[2].

Petitioner correctly cites Mikenas v. State, 367 So.2d 606 (Fla. 1978), for the proposition that a substantial history of prior criminal activity is not an aggravating circumstance under the Florida death penalty statute. But this isn't the end of the matter; it's just the beginning. In Mikenas, the court remarked as follows:

> In capital cases, it is this court's responsibility to ensure that the trial judge remains faithful to the dictates of Section 921.141, Florida Statutes, in the sentencing process. It is not the function of this court to cull through what has been listed as aggravating and mitigating

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2/ The sentence of petitioner is accurately reproduced in its entirety in the joint appendix, pp. 82-141.

> circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court. It was not done in this case. A substantial history of prior criminal activity is not an aggravating circumstance under the statute. Since mitigating circumstances are present, Elledge, supra, dictates resentencing.

Id. at 610. A brief discussion of Elledge v. State, 346 So.2d 998 (Fla. 1977), will be helpful. What mandated the result reached in Elledge was from the record before it the Florida Supreme Court could not determine whether the trial judge had permitted a statutory mitigating circumstance to be offset by a nonstatutory aggravating circumstance. But in the instant case, the trial judge found that there were no mitigating circumstances. Therefore, there could be no danger of a nonstatutory aggravating circumstance

offsetting a statutory mitigating circumstance in the weighing process. The Elledge court did not condemn the use of nonstatutory aggravating circumstances as long as they were not used by the trial judge in offsetting statutory mitigating circumstances.

As recently as July 15, 1982, the Florida Supreme Court in Ferguson v. State, 417 So.2d 639 (Fla. 1982), reaffirmed the principle that nonstatutory aggravating circumstances do not necessarily invalidate the sentence when no mitigating circumstances are found. Please note:

> Our negation of two of the aggravating circumstances found by the trial court would not change the result of this case in the absence of mitigating circumstances for there remain four valid aggravating circumstances. In such cases, a reversal of the death sentence would not necessarily be required, as any error that occurred in the consideration of the two inapplicable aggravating circumstances was harmless. See

> Shriner v. State, 386 So.2d 525 (Fla.1980), cert.denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 289 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert. denied, 447 U.S. 912, 101 S.Ct. 3000, 64 L.Ed.2d 862 (1980); Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); and Elledge v. State, 346 So.2d 998 (Fla. 1977). (Emphasis supplied)

Id. at 646.

Indeed, in Ferguson v. State, 417 So.2d 631 (Fla. 1982), a case involving the same defendant as in Ferguson, 417 So.2d 639, but different murders, the court pointed out that the trial judge had erroneously found as an aggravating circumstance that the defendant was under a sentence of imprisonment at the time that he committed the crime. The court pointed out that although the defendant was serving a two-year period of probation which followed an eighteen-month period of incarceration, he was not confined in prison at the time, nor

was he supposed to be. The court reiterated the principle that persons who are under an order of probation but not imprisoned at the time of the offense do not fall within thr phrase "person under sentence of imprisonment" as set forth in § 921.141(5)(a), F.S. In treating the error of the trial judge in basing the death sentence at least in part on an improper aggravating circumstance, the court remarked as follows:

> Our negation of said aggravating circumstance would not, however, change the result of this case in the absence of mitigating circumstances. In such cases, a reversal of the death sentence is not necessarily required, as any error that occurred in the consideration of the inapplicable aggravating circumstances was harmless. See Shriner v. State, 386 So.2d 525 (Fla.1980), cert. denied, 449 U.S. 1103, 101 S.Ct. 899, 66 L.Ed.2d 829 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979); cert.denied, 447 U.S. 912, 101 S.Ct. 3000, 64 L.Ed.2d 862 (1980). (Emphasis supplied)

Id. at 636.

In Proffitt v. Florida, 428 U.S. 242 (1976), this Court specifically held that the use of nonstatutory aggravating circumstances do not necessarily render a death sentence unconstitutional. The Proffitt opinion sets forth the aggravating circumstances found by the trial judge as follows:

> (1) The murder was premeditated and occurred in the course of a felony (burglary); (2) the petitioner has a propensity to commit murder; (3) the murder was especially heinous, atrocious and cruel; and (4) the petitioner knowingly, through his intentional act created a great risk of serious bodily harm and death to many persons.

Id. at 246. This is particularly interesting because the aggravating circumstance of "propensity to commit murder" is not now and never has been a statutory aggravating circumstance under the Florida death penalty statute [§ 921.141, F.S. (1975)]. See Proffitt,

428 U.S. 248, n. 6, which sets forth the statutory aggravating circumstances in effect at the time Proffitt was decided. The conclusion is unmistakable that this Court approved the use of a nonstatutory aggravating circumstance when used along with other statutory aggravating circumstances for the purpose of supporting the imposition of the death penalty.

Back to Elledge v. State, supra: Again, the court was there confronted with a situation where it was necessary to determine whether the use of a nonstatutory aggravating circumstance was constitutionally permissible. The court then engaged in an exhaustive analysis of Proffitt, concluding as follows:

> It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circum-

> stances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. [Emphasis the court's.]

Elledge, at 1002, 1003. Consequently, under the reasoned analysis of Proffitt by the Florida Supreme Court, the existence of statutory aggravating circumstances and the absence of mitigating circumstances renders unimportant the existence of nonstatutory aggravating circumstances. Neither following petitioner's original trial in February-March, 1975, nor at the conclusion of the hearing mandated by Gardner v. Florida, supra, did the trial judge find any mitigating circumstances. It bears repeating that the sentencing findings of the trial judge were in both instances approved by the Florida Supreme Court. Barclay, 343 So.2d 1266 and 411 So.2d 1310.

B. Application of Harmless Error Rule

In holding as it did in Elledge v. State, supra, and many other cases, that the use of some nonstatutory aggravating circumstances does not require a reversal for a new sentencing hearing as long as there is no danger that those circumstances have not served to overcome the mitigating circumstances in the weighing process, the Florida Supreme Court applied the harmless error rule in refusing to order a resentencing. Indeed, in the two Ferguson cases (417 So.2d 631 and 417 So.2d 639), the application of the harmless error rule is clear. In the very recent case of Ford v. Strickland, ___ F.2d ___ (11th Cir. 1983) No. 81-6200, opinion filed January 7, 1983, Chief Judge Godbold, dissenting in part and specially concurring in part, remarked as follows:

As Zant v. Stephens, 72 L.Ed.2d 222 (1982), suggests, we must initially ask what the Florida Supreme Court's actions mean as a matter of state law. I interpret the Florida Supreme Court to apply a harmless error rule in refusing to order resentencing. The presumption, cited by the Florida court here, that death is appropriate where some aggravating and no mitigating circumstances are present cannot constitute a hard and fast rule of law. The Florida Supreme Court permits the trial judge and jury to forego the death sentence in just such circumstances. See Williams v. State, 386 So.2d 538, 543 (Fla. 1980). The presumption must therefore constitute a harmless error rule that operates only where the initial sentencer has misapplied the sentencing statute. [footnote omitted] . . .

The Florida Supreme Court's actions, so interpreted, pass constitutional muster in this case. See Zant v. Stephens, 72 L.Ed.2d 222, 235 (1982) (Powell, J., dissenting) ("I would leave open -- also for the Supreme Court of Georgia to decide -- whether it has authority to find that the instruction was harmless error beyond a reasonable doubt"); Drake v. Zant, 449 U.S. 999 (1981) (White, J., dissenting to denial of cert.) ("Nor do I believe that the Constitution requires the

Georgia Supreme Court to vacate the sentences if it fails to sustain the Godfrey aggravating circumstance. The cases now before us involve only sentencing, not guilt or innocence, and there is no constitutional right to jury sentencing."). As a matter of general constitutional policy I think it essential that appellate courts be able to employ a harmless error rule where the initial sentencer has found aggravating circumstances to so clearly outweigh mitigating circumstances by such a definitive margin. Otherwise the resultant procedural maze can be expected to subvert the judicial process in cases where the death sentence is imposed.

* * * * *

Some have interpreted the requirements that the jury's discretion be channeled by adequate standards and that the sentence be rationally reviewed to imply that the trial judge and jury in every case must properly apply the statutory standards. See Zant v. Stephens, supra at 228 (Brennan & Marshall, JJ., dissenting; Westbrook v. Balkcom, 449 U.S. 999 (1981) (Stewart, J., dissenting to denial of cert.); Judge Kravitch's dissenting op. at 36-38; Judge Johnson's dissenting op. at 5-6. I cannot agree. The requirements of adequate standards and rational

> review do not possess an immutable meaning that judges can immediately discern; they must be interpreted in light of their dual purposes of insuring reliable and consistent application of the death penalty. Use of a harmless error here rule [sic] frustrates neither purpose. Greater inconsistency is not a danger because the Florida Supreme Court's affirmance is based on the same discretion channeling standards that the jury and judge would use in resentencing the defendant. Presumably the Florida Supreme Court will apply its harmless error rule with an eye towards consistency. Use of a harmless error rule does not risk greater unreliability because the Florida Supreme Court bases its harmless error decision on the same evidence that the trial judge and jury would use on remand.

Id. at 4-7. In the instant case, no evidence considered was inappropriate for consideration. The sentencing judge's erroneous classification of part of that evidence as an aggravating circumstance permitted by the statute should not constitutionally infect the sentence. Again, and this time terminally, in the

instant case there were no mitigating circumstances and the five statutory aggravating circumstances found by the trial judge were upheld by the Florida Supreme Court on two occasions. In so doing, that court logically reasoned that the weighing process would have reached the same outcome even had the sentencing court not found the aggravating circumstance now challenged in this proceeding.

It is noted that the plurality opinion does not fault Chief Judge Godbold's premise that the Florida Supreme Court applied the harmless error rule. Note the following:

> In setting out the state law premise for the presumption that Ford's death sentence should be affirmed due to the existence of five statutory aggravating circumstances and no mitigating circumstances, we noted that the Florida Supreme Court considered whether the sentence would have been different had the sentencing judge found only the five

> aggravating circumstances upheld on appeal. The effect of such an evaluation seems very like the application of a harmless error rule. Therefore, we adopt Chief Judge Godbold's opinion as an alternative ground insofar as it is consistent with the reasoning set forth above.

Id. at 13A.

Application of the harmless error rule is nothing new in this jurisdiction. See North v. State, 65 So.2d 77, 95 (Fla. 1952).

C. Rejection of Alleged Mitigating Circumstances

The tenor of petitioner's brief is that the trial judge committed egregious error in finding from the evidence presented that multiple statutory aggravating circumstances had been proven beyond a reasonable doubt, and, of course, in failing to find any mitigating circumstance. This is understandable when viewed from petitioner's predicament. However, the

claim that a trial judge erred in failing to find certain mitigating circumstances has been previously made and rejected by the Florida Supreme Court. The case of Lucas v. State, 376 So.2d 1149 (Fla. 1979), is informative. There, the defendant produced a psychiatrist at the sentencing hearing who testified that the defendant suffered from a sociopathic personality resulting in defective judgment. Other witnesses testified to defendant's abnormal appearance and behavior on the evening of the shooting. It was urged that the trial judge erred in not finding that the defendant was under extreme mental or emotional disturbance at the time of the commission of the offense [§ 921.141(6)(b)] and could not appreciate the criminality of his conduct. [§ 921.141(6)(f)]. In rejecting this argument, the court stated that "[t]he jury and the judge heard the

testimony, and apparently concluded that the testimony should be given little or no weight in their decisions. We find nothing in the record which compels a different result."

The same contention was made in Sireci v. State, 399 So.2d 964 (Fla. 1981), and again rejected by the court:

> He also says that the trial court improperly failed to consider certain mitigating factors. Findings of a judge are factual matters which should not be disturbed unless there is an absence or lack of substantial competent evidence to support those findings. Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Id. at 971.

Again, in Mikenas v. State, 407 So.2d 892 (Fla. 1981), the court rejected the argument that certain testimony should have been treated as a mitigating circumstance. Please note:

> In relation to defendant's second point, defendant argues that the new testimony heard by the court was not considered properly in its findings. The testimony heard consisted of two psychologists concerning the possibility of defendant's rehabilitation and a minister con cerning his alleged progress in religion. Their testimony was not considered as a mitigating circumstance by the court. The testimony was apparently permitted by the trial court in an abundance of fairness to defendant, but the court was not required to give it weight as a mitigating circumstance.

Id. at 893.

Respondent agrees that this Court is familiar with the manner in which the Florida death penalty statute works and it does work in the way that it is supposed to. If it doesn't, then the Florida Supreme Court takes the necessary action to see that it does. For example, see Francois v. State, 407 So.2d 885 (Fla. 1981), where the court found that the trial court's sentencing errors resulted in the

recitation of three statutory aggravating circumstances that were not properly established by the evidence. Also, Ferguson v. State, 417 So.2d 631 (Fla. 1982), where the court remarked as follows:

> However, in our review capacity we must be able to ascertain whether the trial judge properly considered and weighed these mitigating factors. Their existence would not as a matter of law, invalidate a death sentence, for a trial judge in exercising a reasoned judgment could find that a death sentence is appropriate. It is improper for us, in our review capacity, to make such a judgment.
>
> The judgment of conviction is affirmed. The death sentence is vacated and the cause is remanded to the trial court for the purpose of determining an appropriate sentence. An additional sentence advisory verdict by a jury is not required.

Id. at 638.

For the latest expression of the Florida Supreme Court, see Armstrong v. State, ____So. 2d _____(Fla. 1983), No. 61,871, opinion filed Jan. 20, 1983.

D. Florida's Achievement of a Rational, Consistent and Fair Sentencing Procedure

The Florida death penalty statute was carefully drafted to meet the requirements articulated by this Court in Furman v. Georgia, 408 U.S. 238 (1972), and in Proffitt v. Florida, supra, this Court put its unmistakable stamp of constitutional approval thereon. In an effort to ensure that a trial judge had all relevant evidence necessary for individualized sentencing in capital cases, the legislature in § 921.141(1) provided in pertinent part as follows:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).* Any such evidence

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*Since petitioner's trial, this sentence has been amended. It now provides:

> which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Thus, Florida's statute complies with the sentiments expressed in Gregg v. Georgia, 428 U.S. 153 (1976), where the Court indicated that before a death sentence may be imposed, the attention of the sentencing authority must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. In other words, the sentencing authority should have as much information before it as possible. Approximately two years later, this view was repeated in Lockett v. Ohio, 438 U.S. 586 (1978), as follows:

> In the proceeding, . . . subsections (5) and (6).

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.

438 U.S., at 605.

The case of State v. Shaw, 255 S.E.2d 799 (S.Car. 1979), cert.denied, 444 U.S. 957, is informative. There, the prosecution was permitted, over appellants' objections, to introduce seven photographs in evidence at the penalty hearing. Appellants argued that the photographs should not have been admitted at the penalty hearing because post-mortem abuse is not a statutory circumstance of aggravation. The Supreme Court of South Carolina rejected this contention as follows:

> Appellants have misinterpreted the statutory complex.
>
> The General Assembly adopted this State's current death penalty

statutes in an attempt to comply with the guidelines laid down by the United States Supreme Court in Gregg. Perhaps the most emphasized of these guidelines is the need for an individualized sentence, considering both the circumstances of the crime and the individual defendant.

The purpose of the bifurcated trial proceeding is to permit the introduction of evidence at the pre-sentence hearing that normally would be inadmissible at the guilt determination proceeding. The pre-sentence hearing is for the introduction of additional evidence in extenuation, mitigation or aggravation of punishment. The statute does not exclude from the consideration of the sentencing authority any evidence received at the guilt determination stage. To the contrary, the sentencing authority is required to consider all the evidence received at the guilt determination stage regarding the circumstances of the crime and the characteristics of the individual defendant together with additional evidence, if any, in extenuation, mitigation or aggravation of punishment.

* * * * *

The evidence that Shaw committed acts of post-mortem abuse to Ms. Hartness's body was likewise admissible not only as a circum-

> stance of the crime, but also as evidence of Shaw's character. The acts of post-mortem abuse were of a violent sexual nature and bore a logical connection to the earlier rape of Ms. Hartness.
>
> The photographs depicting the post-mortem abuse to Ms. Hartness's body were properly admitted into evidence and considered by the sentencing authority, not as additional evidence in aggravation of punishment, but as evidence of the circumstances of the crime and the characteristics of the individual defendant Shaw. [Emphasis the courts.]

Id. at 806.

In the case of Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), en banc, the court held that where the jury imposed the death penalty after finding the presence of three aggravating circumstances, any one of which justified the penalty under Louisiana law, the Louisiana Supreme Court's review of the evidentiary sufficiency of only one of the aggravating circumstances was entirely proper. This is so because under

Louisiana law the state supreme court when sitting in review of capital cases was required to find the presence of at least one aggravating circumstance beyond a reasonable doubt. After pointing out that the two challenged aggravating circumstances did not suffer constitutional defects the court remarked as follows:

> Since the requisite one aggravating circumstance of murder in the course of an armed robbery is clearly present and was unanimously found by the jury, the other two circumstances are only material to deciding whether the aggravating and mitigating circumstances weighed together indicate the death penalty should be imposed.
>
> * * * * *
>
> . . . This speculation is beside the mark, however, because the meaningful portions of this verdict, (1) that at least one aggravating circumstance was present and (2) that under the totality of aggravating and mitigating circumstances the death penalty should be imposed, were the product of channeled discretion and are rationally reviewable.

> This Court's opinion in Stephens v. Zant, relied on so heavily by petitioner, is simply inapposite. We do not confront a facially unconstitutional aggravating circumstance and, therefore, we need not vacate the sentence given. . . .
>
> * * * * *
>
> . . . Irregardless of the number of aggravating circumstances returned by the jury, the implication is clear that, in the absence of facial unconstitutionality, one may properly serve as the basis for appellate affirmation of the death sentence. . . .
>
> The Louisiana Supreme Court's review of only one aggravating circumstance was entirely proper. We find no violation of either the Eighth or Fourteenth Amendment.

Id. at 389, 390.

The seminal case construing Florida's death penalty statute is State v. Dixon, 283 So.2d 1 (Fla. 1973), where the court's discussion of the statute reveals a striking similarity to the Louisiana statutory scheme. The court pointed out that when one or more of the aggravating

circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in the statute and that all evidence of mitigating circumstances may be considered by the judge or jury. Dixon, 283 So.2d, at 9. In the instant case, disregarding the alleged improper aggravating circumstance challenged by petitioner, there are an additional five statutory aggravating circumstances found by the trial judge to have been proven beyond a reasonable doubt and approved by the Florida Supreme Court. It is significant that at the conclusion of his summarization of the mitigating and aggravating circumstances, the trial judge specifically pointed out that petitioner Barclay had not presented any matters in his responses to the P.S.I. which mitigated the heinous, atrocious and

cruel nature of the crime (J.A. 134). The trial judge then concluded that there were sufficient and great aggravating circumstances which exist to justify the sentence of death as to petitioner Barclay (J.A. 135).

The discussion of lack of remorse in Sireci v. State, supra, provides an interesting comparison. The court there pointed out that while lack of remorse cannot constitute an aggravating circumstance, it can be offered to the jury and judge as a factor which goes into the equation of whether the crime was especially heinous, atrocious, or cruel, citing Sullivan v. State, 303 So.2d 632 (Fla. 1974), cert.denied, 428 U.S. 911 (1976), as authority for this holding. However, in the instant case petitioner challenges the trial judge's consideration of his prior criminal record. But we

wonder just how the trial judge could have determined the applicability of the mitigating circumstance of "no significant history of prior criminal activity" without considering petitioner's prior record. It is submitted that he had to do so in order to determine the existence vel non of the mitigating circumstance set forth in § 921.141(6)(a), F.S. (1981). Petitioner's prior criminal record was indeed relevant and necessary for the trial judge to make an informed decision. This is precisely the type of evidence that is admissible in a penalty hearing by virtue of the provisions of §921.141(1), hereinabove quoted in pertinent part. This is the kind of information a trial judge must have in order to tailor a sentence that will be individualized both as to the defendant and the circumstances of the crime. In petitioner's original appeal, 343 So.2d

1266, the Florida Supreme Court recited the applicable aggravating circumstances found by the trial judge as to petitioner's codefendant, Dougan. The court then stated that although petitioner had received a life recommendation from the jury, virtually the same considerations applied with respect to the consequences of the criminal episode. In agreeing with the trial judge's override of the jury recommendation, the court remarked as follows:

> When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail. In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld. Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being so nominal (a minor age difference but no suggestion of different maturities), the facts here do not warrant the

> dispensation of unequal justice. See Messer v. State, 330 So.2d 137 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975). "Equal Justice Under Law" is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized. This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.

Barclay, 343 So.2d, at 1271.

The Florida Supreme Court over the years since this state's death penalty statute first became effective, December 8, 1972, has consistently made a concerted effort to see that even-handed justice is dispensed to every capital defendant. Illustrative of this, note the following quoted from the opinion in Walsh v. State, 418 So.2d 1000 (Fla. 1982):

> We find, however, that the trial court should have accepted the jury's unanimous recommendation of life imprisonment. This Court has

repeatedly held that the trial court and this Court must weigh heavily the sentencing jury's advisory opinion of life imprisonment. Tedder v. State, 322 So.2d 908 (Fla. 1975). We have allowed the trial court to overrule a life recommendation only where the facts justifying death are so clear and convincing that no reasonable person could differ. See Buford v. State, 403 So.2d 943 (Fla. 1981), cert.denied, ___ U.S. ___, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982); White v. State, 403 So.2d 331 (Fla. 1981); Zeigler v. State, 402 So.2d 365 (Fla. 1981), cert.denied, ___ U.S. ___, 102 S.Ct. 1739, 72 L.Ed.2d 153 (1982); Johnson v. State, 393 So.2d 1069 (Fla. 1980), cert.denied, ___ U.S. ___, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981); Dobbert v. State, 375 So.2d 1069 (Fla. 1979), cert.denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978); Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert.denied, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978); Douglas v. State, 328 So.2d 18 (Fla.), cert.denied, 429 U.S. 871, 97 S.Ct. 185, 50 L.Ed.2d 151 (1976). And we have reversed the death sentence and directed the trial court to impose life imprisonment where there was a reasonable basis for the jury's

recommendation. Goodwin v. State, 405 So.2d 170 (Fla. 1981); Odom v. State, 403 So.2d 936 (Fla. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); McKennon v. State, 403 So.2d 389 (Fla. 1981); Smith v. State, 403 So.2d 933 (Fla. 1981); Stokes v. State, 403 So.2d 377 (Fla. 1981); Welty v. State, 402 So.2d 1159 (Fla. 1981); Barfield v. State, 402 So.2d 377 (Fla. 1981); Phippen v. State, 389 So.2d 991 (Fla. 1980); Williams v. State, 386 So.2d 538 (Fla. 1980); Neary v. State, 384 So.2d 881 (Fla. 1980); Malloy v. State, 382 So.2d 1190 (Fla. 1979); Brown v. State, 367 So.2d 616 (Fla. 1979); Shue v. State, 366 So.2d 387 (Fla. 1978); Buckrem v. State, 355 So.2d 111 (Fla. 1978); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Provence v. State, 337 So.2d 783 (Fla.), cert.denied, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1976); Jones v. State, 332 So.2d 615 (Fla. 1976); Thompson v. State, 328 So.2d 1 (Fla. 1976); Tedder v. State, 322 So.2d 908 (Fla. 1975); Swan v. State, 322 So.2d 485 (Fla. 1975); Slater v. State, 316 So.2d 539 (Fla. 1975). In this cause, we conclude there was a reasonable basis for the jury's unanimous recommendation and the trial court should have followed that recommendation.

Walsh, 418 So.2d, at 1003, 1004. Based on the multiplicity of challenges of every conceivable nature and kind that have been hurled against those cases affirming the imposition of the death penalty, it must be apparent to this Court that the only time a capital defendant receives a fair and impartial trial is when he is acquitted.

Respondent's argument that the trial judge's consideration of a non-enumerated statutory aggravating circumstance did not vitiate petitioner's death sentence is based in substantial measure upon the nature of the process by which death sentences are imposed and upon the meaning of the term "aggravating circumstance." Under the laws of all thirty-five states

which currently have the death penalty,[3] a verdict of guilt as to a capital offense results in a separate hearing on the issue of punishment in which further evidence may be introduced by the parties. With regard to what evidence may be introduced by the prosecution at this punishment-phase hearing, the laws of the vast majority of states provide that such evidence is not limited to that required to establish the

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[3]/Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington and Wyoming. See Gillers, "Deciding Who Dies," 129 U.Pa.L.Rev. 1, 101-119 (1980); and footnote 4, infra. State statutes which have been declared unconstitutional by the highest state court or which are manifestly unconstitutional under this Court's past decisions are excluded from this list. See, e.g., District Attorney v. Watson, 411 N.E.2d 1274 (Mass. 1980).

aggravating circumstance or circumstances submitted in the case, but may also include (varying with the language of each statute) the nature and circumstances of the offense, the character and background of the defendant, the prior convictions of the defendant, and any other matters relevant to sentencing.[4] This provision is both

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[4]/Ala.Code. tit. 13A, § 5-45(c) (1981 Supp.); Cal. Penal Code § 190.3 (1978 Supp.); Del.Code, tit. 11, § 4209(c) (1979); Fla. Stat. Ann. § 921.141(1) (1979 Supp.); Ga.Code.Ann. § 27-2503(a) (1977); Idaho Code § 19-2515(e) (1977 Supp.); Ky.Rev.Stat. § 532.025.1(a) (1976 Supp.); La.Code.Crim.Pro.Ann., art. 905.2 (1976 Supp.); Md.Ann.Code, art. 27 § 413(c) (1979 Supp.); Miss.Code.Ann., § 99-19-101(1) (1977); Mo.Rev.Stat. § 565.006.2 (1978); Mont.Rev.Code.Ann. § 46-18-302 (1977 Supp.); Neb.Rev.State. § 29-2521 (1979 Supp.); Nev.Rev.Stat. § 175.552 (1979); N.H.Rev.Stat., § 630.5(II) (1977 Supp.); N.M.Stat.Ann., § 21-20A-1(C) (1979 Supp.); N.D.Gen.Stat. § 15A-2000(a)(3) (1978); Ohio.Rev.Code.Ann., § 2929.03(D)(1) (effective 10-19-81); Or.Rev.Stat. § 163.116(1) (1979); 42 Pa.Cons.Stat.Ann., § 9711(a)(2) (1981 Supp.); S.C.Code § 16-3-20(B) (1978 Supp.), as construed by State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 805-

reasonable and consistent with the decision of this Court in Gregg v. Georgia, 428 U.S. 153 (1976):

> We have long recognized that "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender" . . .. Otherwise, "the system cannot function in a consistent and a rational manner." [Citations and footnote omitted.]

Gregg, 428 U.S., at 189. See also Id., 428 U.S. at 203-204. The necessity of individualized sentencing based upon a

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806 (1979), cert.denied 444 U.S. 957 (1979); S.D. Codified Laws Ann., § 23A-27A-2 (1979), Tenn.Code.Ann., §39-2404(c) (1981 Supp.); Tex.Code.Crim.Proc.Ann., Art. 37071(a) (1981 Supp.); Utah.Code.Ann. § 76-3-207(1) (1978); Va.Code.Ann. § 19.2-264.4(B) (1980 Supp.); Wyo.Stat. § 6-4-102(c) (1977). Contra: Ariz.Rev.Stat.Ann. § 13-703(C) (1979 Supp.); Ark.Crim.Code. § 41.1301(4) (1977); Colo.Rev.Stat. § 16-11-103(2) (1979 Supp.); Conn.Gen.Stat.Ann., § 53a-46a(c) (1980 Supp.); Ill.Ann.Stat., ch. 38, § 9-1(e) (1973); Ind.Code.Ann. § 35-50-2-9(d) (1973); Okla.Sta.Ann., tit. 21, § 701.10 (1976 Supp.); Wash.Rev.Code. Ann. § 10.94.020(4) (1977).

broad range of evidence receives even greater emphasis in Woodson v. North Carolina, 428 U.S. 280, 303-305, (1976); and Lockett v. Ohio, 438 U.S. 586, 602-606 (1978).

On the basis of the evidence before it, the sentencing authority (trial judge in Florida) must take at least two actions in rendering a verdict as to punishment. First, it must make a specific written finding that at least one statutory aggravating circumstance is established by the evidence, thus creating the possibility that the death sentence may be imposed.[5]

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[5]/Some states impose additional requirements, such as that the sentencing authority specify any mitigating circumstances if found, e.g., Md.Ann.Code., act. 27 § 413(j) (1979 Supp.); or that a finding be made of the defendant's future dangerousness, e.g., Tex.Code.Crim.Proc.Ann., Art. 37.071(b) (1973). The above generalizations as to the sentencing process do not apply to Texas and the two other states which employ the Texas system of capital

(cont'd on next page)

Second, given that the death penalty may be imposed, the sentencing authority must decide whether this sentence should be imposed and then impose either a sentence of death or a lesser punishment. This provision is characterized by many statutes as determining whether "the aggravating circumstances outweigh the mitigating circumstances." § 921.141(3), F.S. (1981); Cal. Penal Code § 190.3 (1978 Supp.). See also Ala.Code, tit. 13A, § 5-47(e) (1981 Supp.); Ind. Code Ann. § 35-50-2-9(e) (1973); Mo. Rev. Stat. § 565.012.1 (1978); 42 Pa. Cons. Stat. Ann. § 9711(e)(1) (1981 Supp.).

From the above facts, it is apparent that the term "aggravating circumstance,"

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sentencing. Ore.Rev.Stat. § 163.116 (1979); Va.Code.Ann. § 19.2-264.4 (1980 Supp.). See Jurek v. Texas, 428 U.S. 262, 269-274 (1976) for an explanation of that system.

as used in most state statutes, has two entirely different meanings according to the context in which it is used. The first (and arguably more accurate) meaning of "aggravating circumstance" is the legal conclusion the sentencing authority must derive from the evidence in order to even consider the possibility of a death penalty. For example, if the prosecution seeks the death penalty on the theory that the murder was committed after the defendant had escaped from a lawful place of confinement, the jury or trial judge must review the evidence and determine whether this statutory element is present. If the sentencing authority does not make the necessary legal conclusion that this or some other statutory aggravating circumstance is present, the defendant is entitled to a sentence of imprisonment as a matter of law. The second meaning often

given the term "aggravating circumstance," particularly apparent in the statement that the aggravating and mitigating circumstances are "weighed" to determine punishment, is the evidence in aggravation which is before the sentencing authority. The jury or trial judge does not weigh the statutory language of the aggravating and mitigating circumstances, it weighs the evidence which aggravates or mitigates the murder committed. Any contrary interpretation of "aggravating circumstance" in this context, requiring the sentencing authority to consider only the statutory language instead of the facts, would be irrational, nonenforceable, and directly contrary to the requirement that the sentencing process take into the account the individual facts relating to each crime and defendant. Lockett v. Ohio, supra, 438 U.S., at 602-606; Gregg v. Georgia, supra, 428 U.S., at 197-198.

These principles clearly indicate the answer to the issue at bar. The sole significance of statutory aggravating circumstances is to determine, at the threshold of the sentencing process, whether the death penalty may be imposed; the sentencing authority must review the evidence before it and conclude whether any of the statutory categories is present. As pointed out in Gregg v. Georgia, supra, 428 U.S., at 188-198, this requirement serves to "limit" and "channel" the discretion of the trial judge (under Florida law) in making the sentencing decision. Once this determination is made, i.e., that at least one aggravating circumstance has been proven beyond a reasonable doubt, the issue is whether the death penalty should be imposed, and the language of the statutory aggravating circumstances has nothing to do with this question--rather, this decision

is made by the sentencing authority based upon the evidence before it. Since statutory aggravating circumstances operate only to open the door to consideration of the death penalty, and since any one such circumstance will perform this function, regardless of the presence or absence of others, the invalidity or impropriety of any aggravating circumstance found by the sentencing authority would impermissibly taint the sentence of death only if the invalid or improper aggravating circumstance was the only aggravating circumstance found (thus entitling the defendant to a lesser sentence as a matter of law).

This reasoning is inherent in the decisions of Florida and several other states which have considered the present issue. For example, the Georgia courts have repeatedly held that a death sentence

based upon multiple aggravating circumstances will death stand even if some of the circumstances are set aside. As stated in Burger v. State, 265 S.E.2d 796 (1980), cert.denied, 446 U.S. 988 (1980),

> Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance, or in this case two, does not taint the proceedings so as to invalidate the other aggravating circumstance found and the sentence of death based thereon.

(Citations omitted.) 265 S.E.2d, at 800.

Respondent is cognizant of the holdings of this Court in Stromberg v. California, 283 U.S. 359 (1931); Yates v. United States, 354 U.S. 298 (1957); Street v. New York, 394 U.S. 576 (1969); and Bachellar v. Maryland, 397 U.S. 564 (1970). However, in all of these decisions (all relating to the statutory abridgement of First Amendment rights), the Court held that where a jury returns a general verdict of guilt in a

criminal prosecution, and where one of several statutory bases for the conviction is unconstitutional, the conviction must be reversed because it cannot be determined whether or not the verdict rested upon the unconstitutional ground. See Stromberg v. California, supra, 283 U.S., at 267-268; Bachellar v. Maryland, supra, 397 U.S., at 570-571.

Had the trial judge in the instant case imposed the death sentence without specifying what statutory aggravating circumstances had been found to permit such a sentence (assuming arguendo this would have been possible under Florida law), then petitioner's thesis might have at least colorable merit. But such was not the case. In addition to the challenged aggravating circumstance which the trial judge had to consider, he specified in writing at least five other statutory

aggravating circumstances, reciting the facts in support thereof. The impropriety of the one aggravating circumstance does not in any manner change the fact that five other valid statutory aggravating circumstances were found to have been proven beyond a reasonable doubt, nor does it alter in the slightest the evidence which was properly before the jury in the punishment phase. While the merits of petitioner's argument (assuming arguendo the existence of merit) have not been adjudicated by this Court, it has received the attention of least one Justice; in the denial of certiorari in Drake v. Zant, 449 U.S. 999 (1980), Justice White, dissenting from the denial of certiorari, stated that

> The imposition of a death sentence, despite a failure to sustain all of the aggravating circumstances found by the jury, does not conflict with either Stromberg v. California, [supra], or Street v. New York, [supra].

> The Georgia Supreme Court has held that under Georgia law it has the power to determine whether or not a death sentence should be imposed under these circumstances. As I see it, this does not violate the United States Constitution.

Drake v. Zant, 449 U.S., at 1003. For the reasons enunciated above, respondent concurs in this conclusion.

E. A Search for Reasonableness

Approximately twelve years ago, this Court in McGautha v. California, 402 U.S. 350 (1971), rejected the claim that a bifurcated trial and the submission of specific aggravating or mitigating circumstances to the jury were requirements under the United States Constitution. Speaking for a majority of the Court (the last time for nine years that this would occur in a death penalty case), Justice Harlan stated that:

> The Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of the students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. [Citation omitted.]

402 U.S., at 221. Thirteen months after McGautha, this Court radically changed its view in Furman v. Georgia, supra, a decision which resulted in confusion among courts, legislatures, and learned authorities as to what was required to impose the death penalty in conformance with the Constitution. Four years later, at an untold cost in legislative and judicial resources, this confusion was to some degree rectified by Gregg v. Georgia, supra, and its accompanying cases. Since Gregg, however, this Court has continued to periodically modify its view as to what is constitutionally required to impose the

death sentence, steadily placing new areas and issues of capital sentencing procedure under the aegis of constitutional "due process," voiding new state statutes and releasing more condemned criminals from their sentence in the process. Coker v. Georgia, 433 U.S. 584 (1977); Lockett v. Ohio, supra; Green v. Georgia, 442 U.S. 95 (1979); Godfrey v. Georgia, 446 U.S. 420 (1980), Beck v. Alabama, 447 U.S. 625 (1980); Estelle v. Smith, 451 U.S. 454 (1981); Bullington v. Missouri, 451 U.S. 430 (1981). By constantly expanding the principles laid down in the five death penalty cases decided in 1976, this Court has led at least one United States Court of Appeals judge to suspect that "the Court is in process of hedging this penalty about with such obstacles that, as a practical matter, it cannot be carried out." Gibson v. Jackson, 578 F.2d 1045, 1051 (5th Cir.

1978) (Gee, Circuit Judge, specially concurring).

Whether or not such is the case, this Court's decisions from and after 1976 have collectively operated upon the state and federal court system to greatly assist in ensuring that sentences of death will not be carried out. This Court is the final authority on constitutional law, and lower courts and counsel must look to it in formulating analyses and approaches to novel issues in this field of law. The death penalty decisions of this Court have fostered two views: first, by its opinions and its recent history of dealings in this field, it has inadvertently promoted the implicit attitude, particularly in the federal judiciary, that death sentences should be invalidated upon any colorable theory which creates unease in the judicial mind. It may be said without intending any

disrespect to the lower courts involved, that this Court's decisions have reinforced and given legal substance to some judges' personal views on the death penalty, both those who privately oppose it and those who find it difficult or impossible to take the responsibility of upholding such a sentence in any case before them, no matter how constitutional or how justified.

The second signal implicitly sent from this Court by its recent course of decisions is to the convicted murderers on death row and their counsel. The defendants are unmistakably encouraged to litigate, relitigate, and then litigate again all conceivable theories relating to their convictions and sentences, in all courts possible and for as long as possible. Surely a condemned murderer has ample reason to believe from past history, that if he delays his execution for two,

five or ten years, this Court may eventually come up with a new doctrine which will retroactively vacate his sentence. In any event, given so many bites at the apple, the odds favor petitioner finding some court willing to vacate his death sentence because in its view his trial was not free from constitutional error. Both the case at bar and Jurek v. Estelle, 438 U.S. 586 (1978), demonstrate the success of such tactics. For example, in the instant case, at the time of petitioner's trial in February-March, 1975, the use of nonstatutory aggravating circumstances had not been withdrawn by the Florida Supreme Court. It was not until Purdy v. State, 343 So.2d 4 (Fla. 1977), was decided that the use of aggravating circumstances was restricted to those enumerated in the statute. Purdy was decided February 3, 1977, reh.denied, March

25, 1977; however, Barclay, 343 So.2d 1266, was decided March 17, 1977, reh.denied, Apr. 7, 1977. Therefore, at the time Barclay, supra, was decided, Purdy v. State, supra, was final. The only reasonable conclusion that can be drawn in this situation is that the Florida Supreme Court permitted Barclay's death sentence to stand because the trial judge found that five statutory aggravating circumstances had been proven beyond a reasonable doubt in addition to the single nonstatutory aggravating circumstance.

Following Barclay's evidentiary hearing pursuant to Gardner v. Florida, supra, he challenged the reimposition of the death sentence primarily by argument that the findings previously reviewed and affirmed by the Florida Supreme Court were in error. That court finding that the dictates of Gardner had been met and that

there was no defect in the original sentencing order, refused to accept Barclay's suggestion that it abrogate the law of the case. Barclay, 411 So.2d 1310.

Finally, the repeated statements that capital punishment is constitutional have begun to have a hollow ring as a practical matter. It is submitted that we cannot continue to steep capital defendants in unduly expansive procedural protections. At some point, it must be acknowledged that the torturous procedural path of capital cases does more to undermine the criminal justice system and society's confidence in it than it does to protect the rights of those who have killed fellow human beings. A murderer may effectively challenge and re-challenge his death sentence on the same grounds again and again. As stated recently: "They can make these appeals in two state courts, and,

starting fresh, through the Federal system up to the Supreme Court." Newsweek. "The Mistress of Delay," Nov. 16, 1981, at 102-03. For those who argue that the imposition of the death penalty has not been an effective deterrent, respondent submits that if that is so, it is because of the continued delays in carrying out the sentence that has weakened its deterrent effect.

The petitioner did not receive a perfect trial. He will never receive a perfect trial in the courts of this state, or any other state. But he did receive a fair trial, and that's all the Constitution requires. Michigan v. Tucker, 417 U.S. 433 (1974).

CONCLUSION

It is agreed that there are many regrettable aspects of life which influence deeds such as those for which petitioner was convicted and which resulted in the imposition of the death penalty against him; but insofar as this writer is able to judge, the denial of a fair trial, as the law in its present state can provide it, was not one of these.

Petitioner's death sentence resulted from a clearly-channeled, rationally reviewable exercise of discretion by the trial judge which was twice affirmed by the Florida Supreme Court. The judgment of that court affirming for the second time

petitioner's sentence of death should not be disturbed.

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CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 1983, copies of this Brief for Respondent were mailed, postage prepaid, to Ms. Deborah Fins, Suite 2030, 10 Columbus Circle, New York, New York 10019, Attorney of Record; and to Mr. Kenneth Vickers, 437 East Monroe Street, Jacksonville, Florida 32202. I further certify that all parties required to be served have been served.

WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel for Respondent

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Remarks of Trial Judge at Sentencing on April 18, 1980	1a-13a

THE COURT: All right. Thank you.

In this case, nothing further legally having been brought to the attention of the Court concerning the imposition of this sentence, and having denied Mr. Vickers' motion, five years have passed since I last sentenced Mr. Barclay for murder in the first degree and I think it's necessary to briefly review what occurred in this case.

On September 26, 1974, the defendants, Elwood Clark Barclay, Jacob John Dougan, Dwayne Crittendon and Brad Evans were indicted for murder in the first degree in that they did on June 17, 1974, from a premeditated design to effect the death of Steven Anthony Orlando, did kill the said Steven Anthony Orlando by shooting him to death with a pistol. Crittendon and Evans were convicted of murder in the second degree and I sentenced each of them to a term of one hundred ninety-nine years in

the State Prison. Both Barclay and Dougan were convicted of murder in the first degree and I sentenced both of them to death.

This present case is one of the rarest types of crime to come before this Court or any court. The facts at trial prove that this was a premeditated racial hatred murder. The victim was chosen at random, stalked and brutally murdered only because he was defenseless and because he was of a different racial group than that of his murderers.

After the crime, tape recordings were made wherein Barclay and Dougan admitted the murder. They described the killing and the agony of the victim. These boastful tapes were cruelly made and sent to the mother of the murdered boy and to local TV and radio stations, bragging of the murder and announcing that it was the start of a

revolution and promised further violence. One of the tapes said, "White people, prepare yourself to die." It was a call for and an attempt to start a racial war. In my opinion, such ravings can only come from a depraved, homicidal mind.

Similar statements were violently uttered on another continent in our own recent history. During World War II I was among some of the first American combat infantry soldiers to enter Nazi Germany, and I was present at the liberation of several slave labor and concentration camps. Particularly the concentration camps made a vivid and lasting impression upon me. I saw human corpses stacked like chordwood [sic] to be buried or burned in the ovens. These people had been murdered in various ways, by starvation, torture, gassing or they were shot. They were murdered because they were all guilty of

the same crime: they were different from the people who murdered them. They were either of a different race, culture, religion or political belief. That was their only crime; they were different. Surely we must have learned something from that tragic holocaust.

Until the defendants were arrested five years ago, terror stalked the streets of this city, and it was only due to the good will of both black and white citizens that order prevailed and further violence and retaliatory acts were not committed. Nothing good has or ever will come from the murder of Steven Anthony Orlando, but the tragic slaughter of this eighteen year-old youth can be used as an example of the monumental stupidity of racial hatred murder.

The essential facts brought out in this trial were that the four defendants were

part of a group that termed itself the "Black Liberation Army", the "BLA", and whose apparent sole purpose was to indiscriminately kill white persons and to start a revolution and a racial war. The testimony shows that on the evening of June 17, 1974, Barclay, Dougan, Crittendon, Evans and Hearn, set out in a car armed with a .22 caliber pistol and a knife with the intent to kill a devil, the devil being any white person that they came upon under such advantageous circumstances that they could murder him, her or them. As they drove around the City of Jacksonville they made several stops and observed a number of white persons as possible victims. At one stop Dougan wrote out a note which was to be placed on the body of the victim ultimately chosen for death.

Eventually, the five men headed for Jacksonville Beach where they picked up a

hitchhiker, eighteen year-old Steven Anthony Orlando. Against his will and over his protest, they drove him to an isolated trash dump, ordered him out of the car, threw him down and Barclay struck the first homicidal blow by repeatedly stabbing him with a knife. Dougan then put his foot on Orlando's head and shot him twice. Crittendon and Evans played a lesser degree in the murder and were convicted of murder in the second degree.

The evidence showed that none of the defendants knew or had ever seen Orlando before they murdered him. The note which was stuck to Orlando's body by the knife of the murderers read in part, "Warning to the oppressive state: We must destroy our enemy. Therefore, you must die. The revolution has begun." End of quotes.

After the murder, the defendants Barclay and Dougan, by their own admission

and supported by the testimony of other witnesses, made a number of tape recordings concerning the murder. These recordings were mailed to the mother of Steven Anthony Orlando and to the media. All of the tapes contained much of the same content and intent. The tapes read in part as follows: "Mary Ann Mallory" -- that was Orlando's mother -- "don't feel so bad. You haven't lost a son, you got a hero. Your son will go down in Black history. Steven Anthony Orlando was not murdered, by no means. He was given a fair trial. He was tried and found guilty and executed." Then Mr. Barclay and Mr. Dougan said, "The reason Steven was only shot twice in the head was because we had a jive pistol. It only shot twice and then it jammed. You can tell it must have been made in American because it wasn't worth a" -- and I delete the expletive. "He was stabbed in the

back, in the chest and in the stomach. Ah, it was beautiful. You should have seen it. Ah, I enjoyed every minute of it. I loved watching the blood gush from his eyes. He died in style, though, begging, begging, pleading for mercy." And the tapes ended with the words, "Your Black Liberation Army."

William Hearn, who was one of the five persons present at the murder of Orlando, testified at the trial that he witnessed the murder, and he told of the participation of Barclay, Dougan, Evans and Crittendon and Hearn, together with the witnesses Madison, Eldred Black and Otis Best, who all stated that they were present when the boastful tapes were made, and they identified the voices of Barclay and Dougan when the tapes were played to the jury during the trial. That jury, composed of both black and white citizens, found both

Barclay and Dougan guilty of murder in the first degree.

I have carefully considered all of those matters presented by the defendant in response to the presentence investigation report, and I find nothing in such responses which mitigates any circumstance herein. I have prepared a thirty-five page sentence wherein all of the factors set forth in the statute have been analyzed and considered, and I conclude that the messages and the actions of Barclay and the other defendants were in all ways a call to disrupt and hinder the lawful exercise of governmental functions and the enforcement of the laws. It was a call to destroy our government and its laws by violent racial revolution. The defendant Barclay, together with the other defendants, premeditatedly stalked their victim and brutally murdered him. The victim's only

crime was the he was of a different racial group than that of his murderers. He in no way offended them, nor did he even know them before that fatal evening. The victim, Steven Anthony Orlando, was knocked to the ground and repeatedly stabbed by the defendant Barclay as he writhed in pain begging for mercy.

In addition to an unprovoked premeditated murder, it was a declaration of war against a racial group with the promise of more violence, death, and revolution to come. Such acts of Barclay and the other defendants were of the basest, most callous homicidal type and they shreik out for the severest punishment and the termination of the existence of the perpetrator. The passage of five years from the date of this murder until the date of this sentence has not diminished the nature of the crime. Steven Anthony

Orlando was murdered and he is still dead, and the call for bloodshed and revolution continued to echo.

There are sufficient and great aggravating circumstances which exist to justify the sentence of death as to the defendant Elwood Clark Barclay. I, like so many American combat infantry soldiers, walked the battlefields of Europe and saw the thousands of dead American and German soldiers, and I witnessed the concentration camps where innocent civilians, children, were murdered in a racial, religious and political war of extermination. To attempt in this country to initiate such a race war is too horrible to contemplate. Had this defendant and the other defendants been exposed to the carnage of the battlefields and the horrors of the concentration camps instead of movies, television programs and revolutionary tracts glorifying violence

and racial strife, then perhaps their thoughts and actions would have taken a less violent course.

Having set forth my personal experiences, it is understandable that I am not easily shocked or moved by tragedy, but this present murder and call for racial war is especially shocking and meets every definition of heinous, atrocious and cruel. The perpetrator thereby forfeits his right to life, for certainly his life is no more sacred than that of the innocent eighteen year-old victim, Steven Anthony Orlando. Having adjudged Elwood Clark Barclay guilty of murder in the first degree, I hereby sentence him to death. I order that he be taken by the proper authorities to the Florida State Prison, and there kept in close confinement until the date of his execution be set, and on such day as set, he be put to death by

having electrical currents passed through his body in such amounts and frequency until he is rendered dead.

I advise the defendant that he has thirty days from today within which to take an appeal, and I hereby appoint Mr. Kenneth Vickers to represent him on such appeal.

May God have mercy upon your soul.

Count's in recess.

NO. 81-6908-CSY	TITLE Elwood BARCLAY, Petitioner v. Florida

DOCKETED	COURT
June 14, 1982	Supreme Court of Florida

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: William P. White
	Counsel for Respondent: Jim Smith
June 14, 1982	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Record filed).
July 20, 1982	Brief for the respondent in opposition filed.
July 22, 1982	DISTRIBUTED. SL12P2.
Sept. 27, 1982	Supplemental brief of respondent filed. (D).
Oct. 4, 1982	REDISTRIBUTED. 10-8.
Oct. 12, 1982	REDISTRIBUTED. 10-15.
Oct. 25, 1982	REDISTRIBUTED. 10-29.
Nov. 1, 1982	REDISTRIBUTED. 11-5.
Nov. 8, 1982	The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are GRANTED.

Dec. 22, 1982	Order extending time to file petitioner's brief on the merits until Dec. 29, 1982. (Orally, ALS)
Jan. 3, 1983	Brief of petitioner Elwood Barclay filed.
Jan. 3, 1983	Joint appendix filed.
Jan. 29, 1983	Brief for the respondent filed.
Feb. 15, 1983	CIRCULATED.
March 30, 1983	ARGUED.